Volume XI Number 1

MISSISSIPPI LAW JOURNAL

SEPTEMBER, 1938

WORK OF THE MISSISSIPPI SUPREME COURT FOR SEPTEMBER 1937, AND MARCH 1938, TERMS 1

CLAYTON v. CLARK ..... *John H. Fox* 95

BIOGRAPHICAL SKETCHES 105

COMPLETE TABLE OF CONTENTS OF THIS ISSUE ON PAGE i

Entered as second class matter at the Post Office at University, Mississippi, with additional entry at the Post Office at Meridian, Mississippi, November 25, 1936.

Published five times a year: August, September, December, February, and April.

$3.00 PER ANNUM - - - - - - - - 75 CENTS PER NUMBER

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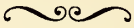

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Mississippi Law Journal

VOLUME XI SEPTEMBER, 1938 NUMBER 1

Contents

THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1937, AND THE MARCH 1938, TERMS

I.	Statistical Survey	*C. Sidney Carlton*	1
II.	Appeals	*Hugh N. Clayton*	6
III.	Contracts and Commercial Law	*William C. Keady*	11
IV.	Criminal Law	*Jamie L. Whitten*	17
V.	Evidence	*Frederick C. Berger*	24
VI.	Insurance	*O. B. Triplett, Jr.*	30
VII.	Negotiable Instruments	*Charles S. Tindall*	41
VIII.	Pleading, Practice and Procedure	*T. C. Kimbrough*	44
IX.	Property, Including Wills	*W. G. Roberds*	49
X.	Remedies	*T. Leslie Darden*	60
XI.	Taxation	*John W. Wade*	65
XII.	Torts and Negligence	*Wex S. Malone*	76

MISSISSIPPI LEADING CASES

Clayton *v.* Clark	*John H. Fox*	95

BIOGRAPHICAL SKETCHES

Life of Judge A. H. Whitfield	*Will H. Watkins*	105
James Hector Currie, Orator and Lawyer	*Geo. H. Ethridge*	116

Editorial Notes 93

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Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR

VOL. XI. SEPTEMBER, 1938 No. 1

THE WORK OF THE MISSISSIPPI SUPREME COURT FOR THE SEPTEMBER 1937, AND THE MARCH 1938, TERMS

I.

STATISTICAL SURVEY

*C. Sydney Carlton**

The Supreme Court of Mississippi was indeed unfortunate in its loss of the services of Justice William H. Cook, who died October 5, 1937, but was very fortunate in the governor's appointment of so able a successor as Justice Harvey McGehee. Justice Cook wrote only two opinions at the September, 1937 term before his death. However, Justice McGehee, in spite of the handicap of entering upon the duties of his office at a late date, was the spokesman for the court on sixty occasions, and, by the high tone and quality of these opinions, stamped himself as a worthy jurist.

Table I, contained herein, was prepared by Hon. Tom Q. Ellis, and Hon. E. L. Shelton, Clerk and Deputy Clerk, respectively, of the Supreme Court. This table was compiled from the original records of the court and the writer gratefully acknowledges the assistance given him by the compilers. The other tables were compiled from the cases carried by the Southern Reporter and contain only the cases therein reported.

Table II shows the disposition of the cases upon appeal, by reference to the Justice writing the opinion.

Table III is a topical analysis of the cases, by reference to the Justice writing the opinion. It should be borne in mind in consulting this table that the topic under which a given case is entered is not necessarily the only topic under which it might have been entered, but that it was necessary in many cases to draw an arbitrary line for the sake of tabulation.

*Note Editor, MISS. L. J. The writer gratefully acknowledges the valuable assistance rendered by Mr. Fletcher Veazey, Jr., Assistant Editor, M. L. J.

Table IV shows the dissents and special concurrences. It is interesting to note that a dissenting opinion is found in approximately 0.9% of the total cases handled by the court.

Table V shows the disposition of the cases on appeal by reference to the judge sitting upon the case in the lower court. It should be remembered in examining this table however, that it has little, if any, tendency to show the relative ability of the judges considered therein. As the table considers only cases carried by the Southern Reporter and covers only the 1937-38 sitting of the Supreme Court it is unreliable as a basis of comparison. It is published here only with the hope that it may be of interest to the bar of the state.

TABLE I.

Cases on docket at opening of September term	160
Cases on docket at adjournment in June	113
Motions handled by court	101
Cases decided without written opinion	78
Cases disposed of for failure of appellant to prosecute appeal	53
Suggestions of Error filed	163
Suggestions of Error overruled	158
Suggestions of Error pending upon adjournment	5
Cases handled by the court	448

TABLE II.

	Anderson, J.	Cook, J.	Ethridge, P. J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, C. J.	Per Curiam	TOTAL
Affirmed	27	1	38	33	24	24	23	78	248
Affirmed and Remanded	—	—	—	2	—	—	1	—	3
Affirmed on condition of Remittitur	1	—	4	1	1	—	1	—	8
Modified, and as modified, Affirmed	—	—	—	1	—	—	—	—	1
Affirmed in part, and Reversed and Remanded in part	—	—	1	3	2	1	1	—	8
Affirmed in part, and Reversed and Rendered in part	—	—	—	—	1	2	3	—	6
Reversed and Remanded	17	1	10	14	11	12	12	—	77
Reversed and Rendered	7	—	7	8	12	10	9	—	53
Reversed and Rendered in part, and Reversed and Remanded in part	—	—	1	—	2	3	—	—	6
Appeal Dismissed	—	—	—	—	1	1	—	—	2
Suggestion of Error Overruled	1	—	2	7	6	1	—	1	18
Motions Sustained	—	—	1	1	—	1	3	—	6
Motions Sustained in part, Overruled in part	1	—	—	—	—	—	—	—	1
Motions Overruled	—	—	1	3	—	—	—	2	6
Motions Dismissed	—	—	—	—	—	—	1	—	1
TOTALS	54	2	65	73	60	55	54	81	444

TABLE III.

	Anderson, J.	Cook, J.	Ethridge, P. J.	Griffith, J.	McGehee, J.	McGowen, J.	Smith, C. J.	TOTAL
Agency	—	—	1	—	—	2	—	3
Appeal & Error	1	1	2	15	3	3	4	29
Automobiles	2	—	—	1	1	2	—	6
Banks & Banking	—	—	—	—	2	—	—	2
Bills & Notes	2	—	1	—	3	—	1	7
Carriers	—	—	1	2	—	1	—	4
Charities & Paupers	—	—	2	—	—	—	—	2
Constitutional Law	—	—	2	1	1	—	2	6
Contracts	—	—	1	—	—	—	1	2
Corporations & Partnerships	—	—	2	4	—	—	—	6
Counties and States	—	—	—	—	—	—	3	3
Criminal Law	11	—	11	8	12	11	5	58
Damages	—	—	1	2	—	—	—	3
Eminent Domain	5	—	—	—	2	1	1	9
Equity	2	—	3	—	—	—	—	5
Evidence & Witnesses	4	1	1	5	—	1	2	14
Homesteads	—	—	2	—	—	1	1	4
Infants	—	—	1	—	—	—	—	1
Insurance	3	—	—	4	6	5	4	22
Intoxicating Liquors	—	—	3	1	2	1	1	8
Marriage & Divorce	2	—	1	—	1	5	1	10
Master & Servant	1	—	2	3	4	2	3	15
Mortgages	—	—	4	3	—	3	2	12
Municipal Corporations	2	—	3	2	2	1	1	11
Officers	—	—	2	—	—	—	1	3
Practice and Procedure	5	—	7	4	5	2	4	27
Railroads	—	—	1	—	1	—	1	3
Real Property	1	—	5	3	3	2	2	16
Sales	1	—	—	—	—	2	—	3
Schools & School Districts	—	—	—	—	1	1	—	2
Statutes & Statutory Construction	2	—	2	2	2	2	2	12
Taxation	3	—	1	2	1	1	3	11
Torts	2	—	1	4	2	—	2	11
Wills, Executors & Administrators	1	—	1	2	4	2	3	13
Memorandum Decisions	4	—	—	5	2	4	4	19

TABLE IV.

	Dissents with Opinion	Concurs in another Dissent	Concurs specially with Majority	Partly Concurring, partly Dissenting
Anderson, J.	2	----	----	----
Cook, J.	----	----	----	----
Ethridge, P. J.	1	1	----	1
Griffith, J.	----	----	1	----
McGehee, J.	----	----	----	----
McGowen, J.	----	----	----	----
Smith, C. J.	1	----	1	----
TOTAL	4	1	2	1

TABLE V.

	Affirmed	Affirmed and Remanded	Affirmed on condition of Remititur	Modified, and as Modified, Affirmed	Affirmed in part & Reversed and Remanded in part	Affirmed in part & Reversed and Rendered in part	Reversed and Remanded	Reversed and Rendered	Reversed & Rendered in part & Reversed & Remanded in part	TOTAL
Hon. Wm. A. Alcorn, Jr.	7	----	----	----	----	----	3	3	----	13
Hon. J. P. Alexander	21	----	----	----	----	----	10	1	2	34
Hon. John F. Allen	10	----	----	----	1	----	2	2	----	15
Hon. D. M. Anderson	9	----	----	----	----	----	8	4	----	21
Hon. R. B. Anderson	3	----	1	----	----	----	3	1	----	8
Hon. R. E. Bennett	4	----	----	----	----	1	2	5	----	12
Hon. Arthur G. Busby	4	----	1	----	----	----	1	3	----	9
Hon. S. F. Davis	7	----	1	----	2	----	3	3	1	17
Hon. J. F. Guynes	3	----	----	----	1	----	2	1	----	7
Hon. Thos. H. Johnston	24	----	----	----	----	----	5	2	----	31
Hon. John M. Kuykendall	7	----	----	----	----	----	----	1	----	8
Hon. Edgar M. Lane	17	----	----	----	----	----	----	----	----	17
Hon. T. H. McElroy	12	----	----	----	----	----	----	1	----	13
Hon. Harvey McGehee	12	----	1	----	----	1	2	----	----	16
Hon. W. J. Pack	16	----	----	----	----	----	3	1	----	20
Hon. J. C. Shivers	3	----	----	----	----	----	1	----	----	4
Hon. John C. Stennis	9	----	1	----	----	----	2	2	----	14
Hon. W. A. White	11	----	2	----	1	----	7	2	----	23
Special Judges	3	----	----	----	----	----	2	----	----	5
Hon. A. B. Amis, Sr.	6	----	1	----	----	1	2	----	----	10
Hon. R. W. Cutrer	4	----	----	----	----	----	3	3	----	10
Hon. Jas. A. Finley	15	----	----	----	----	----	3	----	----	18
Hon. T. P. Guyton	2	----	----	----	----	----	1	2	----	5
Hon. R. E. Jackson	3	----	----	1	3	----	2	2	1	12
Hon. M. B. Montgomery	3	----	----	----	----	----	----	----	----	3
Hon. D. M. Russell	3	----	----	----	----	----	1	2	----	6
Hon. L. A. Smith, Sr.	2	1	----	----	----	1	2	----	----	6
Hon. Ben Stevens	7	----	----	----	----	1	1	4	1	14
Hon. V. J. Stricker	13	----	----	----	----	----	3	----	----	16
Hon. J. L. Williams	6	1	----	----	----	1	2	7	1	18
Special Chancellors	2	1	----	----	----	----	1	1	----	5
TOTAL	248	3	8	1	8	6	77	53	6	410

II.
APPEALS

*Hugh N. Clayton**

A. Degree of Review of Jury Verdicts

While not an entirely new principle in Mississippi, the decisions of the Supreme Court reviewed here have elaborated and extended the principle that jury verdicts must rest on probabilities, not on possibilities.

In *Yazoo & M. V. R. Co. v. Lamensdorf*[1] suit was brought against the appellant on the ground that it was negligent in not stopping its train within 45 seconds and thereby avoiding striking an automobile on a public crossing in which the deceased was killed. The case for the appellees was built on the testimony of one witness, to the effect that the car of the deceased was stalled on the railroad track for that period of time and the appellant could have stopped its train before reaching the crossing. It was held that such statement of the witness could not be considered anything except incredible when viewed in the light of ordinary human experience and observation. The rule was reiterated that to present a possibility, rather than a probability, is not a sufficient basis for a verdict and judgment.

This rule was further applied in *Yazoo & M. V. R. Co. v. Skaggs*[2] wherein suit was brought against the railroad company averring that, in alighting at night from a passenger coach, appellee was severely injured by reason of the negligence of the carrier in respect to the stepbox used on that occasion. The testimoney of the witnesses for the appellee was not clear and positive, and one of his witnesses testified that appellee's eye-sight was not good. The appellee testified that he went down the coach steps in a hurry, that he had bundles under his left arm and that he did not use his right arm to support himself by holding on to the handrail. The proof showed that he was 68 years of age and weighed about 200 pounds. It was charged that the appellant was negligent in that the stepbox was placed on rough and uneven ground, was placed too far back under the coach steps and sufficient light was not furnished. The court held, with the testimony being as it was, that only within the realm of possibility could the appellant be liable and said that, despite the fact that the jury had rendered

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*A.B. (1929); LL.B. (1931) Univ. of Miss.; Member Mississippi and Union County Bars; New Albany, Mississippi.

[1]180 Miss. 426, 178 So. 80 (1938).

[2]179 So. 274 (Miss. 1938).

a verdict for the appellee, it had no force to convert a possibility into a probability, although it was treated with great respect by the court. The case was reversed and judgment given for the appellant on the ground that verdicts and judgments in civil actions must be based on probabilities of the case, not on possibilities.

This rule is fully elaborated, and the position of the court made clear, in *Tech Lines, Inc. v. Bounds*[3], wherein suit was brought against the appellant for injuries alleged to have been sustained by the appellee when a piece of gravel was thrown by a passing bus and struck the left lens of appellee's spectacles, shattered the lens and drove four pieces of the glass thereof into his eye. Appellee testified that these pieces of glass were put into a glass vial after being taken from his eye and a vial was exhibited to the jury which was said to contain the four pieces of glass. He further testified that, with these four pieces of glass sticking in his eye, he drove an automobile some six or seven miles to a physician who removed the pieces of glass. The opinion recites that additional briefs were requested from counsel as to whether or not a person so injured, according to the course of common and natural experience and observation, could have driven an automobile for such a distance with the glass embedded in his eye and before he reached treatment therefor. The opinion recites that no argument was advanced as to this particular question and recites that the argument made was that a bare possibility was converted by a jury verdict into an actuality or probability.

Because of such frequent argument assigned before the court, the court made a full and complete exposition of the rule, reviewing the decisions of many states. It was said that where evidence is so contrary to the probabilities when weighed in the light of common knowledge, common experience, and common sense that impartial, reasonable minds cannot accept it other than as clearly an improbability, it will not support a verdict.

After reviewing the decisions of other states as well as Mississippi and particularly noting the two cases already mentioned in this article, the rule was announced that verdicts are to be founded upon probabilities according to common knowledge, common experience, and common sense, and not upon possibilities and a verdict cannot convert a possibility or any number of possibilities into a probability. But before an appellate court can say that what the jury has adjudged as a probability is nevertheless, only a possibility, it must be clear or manifest that only a possibility rather than a probability is shown by the evidence. There should be no

[3]179 So. 747 (Miss. 1938).

confusion in Mississippi following this decision as to what the true rule is, although it is natural to expect considerable difficulty will be had in applying it to the particular cases.

B. Functions of the Court

The court has rendered two decisions which are not original propositions but reaffirm its previous decisions with regard to what it will not do in the performance of its appellate jurisdiction. In *Fighting Bayou Drainage Dist. v. Leflore County*[4], a decision of the court was asked as to whether or not drainage taxes not due when the bill of complaint was filed should be assessed against one party or the other to the litigation. The court refused to do so, saying that to comply with the request would be to give an advisory opinion which, of course, the court does not do. In *Adams v. Hicks*[5], the court was called upon to decide whether or not the master was negligent in certain particulars, thereby making a dangerous place for the servant to work. It does not appear in the opinion that this principle was urged on the court, but the court said that it is not its duty to prescribe a certain method by which an operation can be made reasonably safe; but it is its duty to declare that, when the facts warrant a finding that the master has not exercised reasonable care to create a reasonably safe place in which a human being is to work, then negligence is established.

C. Appellate Procedure

The court has rendered certain decisions with regard to procedure for cases on appeal. One of these is *Spitchley v. Covington*[6]. In this case the trial judge ordered that all the original exhibits in the case be made a part of the record on appeal in lieu of copies. The Supreme Court held that this procedure was not in accordance with Rule 28 of the Court and said no reason was assigned by the lower court rendering it necessary and proper for the original papers to be sent up. It was held that such original exhibits should be sent with the record only when an inspection of them instead of the copies thereof would aid the Court in determining a matter before it. The Court further said that it stressed this rule for the benefit of trial courts which grant orders to send up masses of original exhibits which the Supreme Court could not examine intelligently without the aid of an accountant or an expert, and that the Court will not permit such exhibits except in unusual cases.

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[4]180 Miss. 223, 177 So. 6 (1937).
[5]178 So. 484 (Miss. 1938).
[6]177 So. 31 (Miss. 1937).

In *Richards v. King's Daughters & Sons, Circle No. 2*,[7] suit was brought for specific performance of an alleged contract. Following the institution of the suit and pending the appeal, the work sought to be performed under the order of the court as prayed for in the bill of complaint was completed. The appellee filed a plea in bar to this appeal, alleging that the matter had become moot and an affidavit of the business manager of the appellee was filed with the plea, the affidavit reciting that all of the work had been completed. The court held that since there was no denial of the facts set forth in the affidavit in support of the plea in bar, and the facts presented sufficient matter to bar the appeal, the plea should be sustained and the appellant be remitted to a suit for damages, if he were entitled to damages in connection with the transaction.

An interesting decision, because of the particular language used, is found in *Byrd et al. v. Board of Supervisors of Jackson County*.[8] It deals with the functions of a suggestion of error and the decision recites what is not proper to include in such a pleading. That portion of the decision dealing with this question is in the following language: "We note that counsel say that our original opinion is of such character that lawyers and the people do not know what to depend upon as to what the law is or what the courts are going to say upon any legal proposition; that even the Constitution may be set aside at the pleasure of the courts and that it is no wonder the American people are fast beginning to have no respect for the Constitution or the laws. Although rarely, we have nevertheless sometimes seen similar expressions in suggestions of error. The office of a suggestion of error is to furnish light, not heat; and there ought to be no difference of opinion that expressions such as mentioned above are improper, whether in or out of court."

The Court decided other questions with reference to appellate procedure but they dealt with matters which have been stated from time to time and are not new propositions.

D. Effect of Supersedeas and Prohibition

Considerable litigation throughout the state has taken place within the last year or so with respect to attempts of counties and municipalities to restrict or prohibit sales of light wines and beer. A frequent recourse to the courts has been by writs of *certiorari* and *supersedeas* and writs of prohibition. Apparently, it was the idea of the bar throughout the state that ordinances and other regulatory acts which were superseded by proper writs were nullified

[7]182 So. 101 (Miss. 1938).
[8]179 Miss. 880, 176 So. 910 (1937).

in so far as criminal prosecutions were concerned for violations thereof during the pendency of the writ. This idea was shown to be erroneous by a statement in *Blount v. Kerley*,[9] wherein it was recited that the only effect of superseding an ordinance or prohibiting prosecution thereof, is to suspend operation of the ordinance until the hearing in the particular prosecutions either has been brought or contemplated; that it did not authorize the violation of law, or of an ordinance, if valid; that no protection was afforded a violation of a valid statute or ordinance during the period of suspension; and that such violation might be prosecuted after the termination of the *certiorari* with *supersedeas* or prohibition.

It would appear, however, that this portion of the decision did not come to the general attention of the bar throughout the state, and a further announcement of the rule was made in *Early v. Board of Supervisors*,[10] which was decided three months subsequent to the *Blount* case. In this second case, it was said that there was a prevalent misconception that an appeal with *supersedeas* operated as a judicial license to continue operations under the beer and wine statute, Mississippi Laws 1934, c. 171, in spite of an adverse election and the consequent judgment of the tribunals of original jurisdiction.

It was held that an appeal with *supersedeas* does not vacate the judgment appealed from; it merely suspends the enforcement of the judgment pending the determination of the appeal. If, on that determination, the judgment be affirmed, the effect thereof is to establish or confirm the validity of the judgment from and as of the date of its rendition in the court of original jurisdiction; and thereupon all offenses against it during the time the appeal was pending will be punishable as if no appeal had been taken and regardless of the *supersedeas*.

Following these two decisions, several pending cases of *certiorari* with *supersedeas* and prohibition in various counties were dismissed by the petitioners because of the fear of criminal prosecutions should the attack on the regulatory and prohibitory acts fail.

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[9]180 Miss. 863, 178 So. 591 (1938).
[10]181 So. 132 (Miss. 1938).

III.

CONTRACTS AND COMMERCIAL LAW

*William C. Keady**

A. Contracts

During the past term the Supreme Court upheld and applied several clauses found in contracts of employment that are of considerable benefit to the employer. A study of two cases involving such contracts will enable the contract draftsman to secure substantial rights for the employer arising out of the employment relation.

In the well-considered case of *Wilson et al v. Gamble et al*,[1] the court held valid an agreement by the employee not to compete with his employer, upon termination of the contractual relation, within a specified area for a definite length of time. In 1929 the defendant physicians were hired by the complainant physicians under written contracts binding the former not to engage in the independent practice of medicine, upon leaving the service of complainants, for a period of five years in the City of Greenville, Mississippi, or within five miles of the corporate limits thereof. In 1937 the defendants terminated their contracts and immediately began to practice their profession within the forbidden area. Enforcement of the restrictive covenants by injunctions was held to be proper. As intimated in two earlier cases,[2] the court adopted the general view of the authorities that a bargain by an assistant not to compete with his principal, within such territory and during such time as may be reasonably necessary for the principal's protection, is valid unless it tends to effect a monopoly.[3] In this case the limitations of time and space appeared to be reasonable in view of the large medical practice enjoyed by the complainants, giving rise to a proprietary interest that might be protected by reasonable restrictions placed upon employees. Evidence of there being in Greenville an adequate number of physicians to take care of the medical needs of the community disproved that the public interest would suffer by enforcing the covenants or that a monopoly would result therefrom. It was unsuccessfully urged by the defendants that the contracts, being terminable at will, were unenforceable for lack of mutuality; to which answer was made that the defendants,

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*LL.B., Washington University 1936; Member Mississippi and Washington County Bars; Greenville, Miss.

[1]180 Miss. 499, 177 So. 363 (1938).

[2]Townsend v. Hurst, 37 Miss. 679 (1859) and Sivley v. Cramer, 105 Miss. 13, 61 So. 653 (1913).

[3]2 Restatement, Contracts (1932) § 516.

having been employed under the contracts for more than eight years, would not be inequitably treated by the operation of their covenants.

Another phase of the instant case dealt with the controversy between the parties over the interpretation of the contracts with respect to the way in which the earnings of the defendants should be computed. Where the proof showed that the complainants acceded to the defendants' demands and proposed to abide by the contracts, the defendants were not justified in withdrawing from the contracts under a claim that the covenants were not binding upon them.

The case of *Fornea v. Goodyear Yellow Pine Company et al*[4] is also interesting from the standpoint of contractual advantages to the employer. By virtue of a clause in the contract of hire that waived the benefits of the Privileged Communication statute,[5] the testimony of the attending physician was properly admitted over the objections of the employee who had sued the employer for personal injuries sustained in the course of employment. While it had been previously held by our court that the statute, being a personal privilege, might be waived by contract,[6] such a provision is not usually made a part of the terms of ordinary employment. But a verdict in favor of the corporate employer, undoubtedly influenced by medical testimony adverse to the plaintiff, demonstrates the value of such a contractual provision.

Another arrangement designed to benefit the employer was present in the contract of employment involved in the *Fornea* case. As a special plea to the suit for personal injuries, the defendant set up that the plaintiff was estopped from asserting the claim because he had, pursuant to an agreement, stated in writing at the end of each month that he had neither sustained a personal injury while in the defendant's employ nor had a claim pending against the defendant, who, in turn, paid the employee "bonus money" for the receipt of such information. Whether these acts would work an estoppel against suit by the employee was not specifically answered by the court, although there were certain intimations to that effect. Certainly the point could not well be made unless the proof showed that the employer, relying on the information, acted to his prejudice. In the instant case, the fact that the employer knew about the injury and induced the employee to sign a formal release of his claim removes any question of the employer being

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[4]178 So. 914 (Miss. 1938).
[5]Miss. Code Ann (1930) § 1536.
[6]Sovereign Camp, W. O. W. v. Farmer, 116 Miss. 626, 77 So. 655 (1917).

misled by the monthly statement made by the plaintiff. However, in a proper case where the employer does act upon such information by paying the employee a consideration therefor, it would seem that a theory of estoppel might be argued with a great deal of force.

The principal point involved in the case turned upon whether or not the release signed by the plaintiff was binding upon him, and as the evidence thereon was conflicting, the court held that the issues were properly submitted to the jury under correct instructions embodying familiar rules of contract law.

B. Agency

Unfair dealing by a factor towards the consignor of goods rendered him liable for the market value thereof in *Gridley, Maxom & Co. v. Turner.*[7] The consignor delivered to the defendant a quantity of pecans to be sold, for a commission, at the "best market obtainable." An advance per pound was paid to the owner by the fctor. Three weeks after delivery, the consignor instructed that the pecans be held for a better market and offered to remit the advances received by him in order that sale might be deferred. Thereupon the factor replied that the pecans had already been sold, which was actually untrue. On the theory of unfair dealing the plaintiff was allowed to recover the fair value of the consignment as determined by the general market. The court approvingly quoted the succinctly stated law bearing on the subject that was first announced in *Cotton v. Miller.*[8]

Where a public officer orders merchandise in the name of a public body without proper authority therefor, to what extent, if any, is the officer personally liable? It was recently held that the official cannot be personally held as long as he acts in good faith, unless he has led the creditor to believe that he will be responsible on the contract or unless credit was directly extended to the offiicer individually.[9] If none of these exceptions to non-liability appears in the evidence, the officer, sued individually, is entitled to a peremptory instruction.[10]

An interesting case involving the authority of an attorney to accept service for his client is that of *Mattingly's Bakery v. Sparks Milling Company.*[11] An attorney was employed by a foreign cor-

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[7]179 Miss. 872, 176 So. 731 (1937).
[8]52 Miss. 7 (1876).
[9]Murphy v. Panther Oil & Grease Mfg. Co., 179 So. 879 (1938).
[10]*Ibid.*
[11]179 So. 271 (Miss. 1938).

poration to bring suit on a note. After the filing of suit, the defendant enjoined its prosecution and set up, as an equitable set-off, a large demand over. Citation to the non-resident to show cause why the injunction should not issue was served upon the attorney, and no other service was made upon the client. The attorney appeared in court to ask for additional time within which to file a demurrer to the bill, which was granted. Before the expiration of that time, the action on the note was nonsuited. The chancellor held that there was no occasion for injunctive relief and dismissed the bill, refusing to hear the demand over the ground that the corporation was not in court. The evidence showed that the attorney had not been employed to appear in the equitable proceeding. Affirming the decree below, the court held that the employment of an attorney confers upon him no agency or authority other than to prosecute that particular action and to ward off defenses to it. Such authority includes the right of the attorney to resist an injunction suit restraining the prosecution of the suit for which he is employed. To that degree, but no further, the authority of the attorney would extend, but with a demand over as in the instant case, he has no concern in the absence of special employment therefor. Had the demand over been set up in the original action, however, the dismissal of suit would not have affected the agency of the attorney so as to prevent the obtaining of judgment on the counterclaim.

C. Usury

In two instances during the past year our court has had occasion to define what constitutes usury under the statute.[12] In order to violate the statute, there must be either an agreement to pay more than the legal rate of interest or a receipt by the lender of an excessive rate. A mere intention to collect, in the absence of an agreement or receipt thereof, is not usurious. Hence, a bare book entry charging an illegal rate, as the evidence showed in one case, does not penalize the lender.[13] But if it appears that the book entries are accepted by the parties and made the basis of settlement, usury is exacted from the borrower.[14] In the latter case the court also held that the usury statutes are violated by a contract that calls for a maximum rate of interest calculated from the date of the contract, where the money is actually to be advanced to the borrower at a later date. Interest begins to run only from the date of the advance of the consideration. The logic of this

[12]Miss. Code Ann. (1930) § 1946.
[13]Howell v. Ott, 180 So. 52 (Miss. 1938).
[14]Taylor v. Copeland, 181 So. 742 (Miss. 1938).

phase of the opinion is questionable if the contract allows the borrower to obtain all or any part of the loan whenever desired.

It is settled law that the renewal, or renewals, of an obligation tainted with usury does not purge the original transaction or estop the debtor from pleading usury.[15] An equally well-recognized rule is that, after a borrower's claim of usury in the original transaction has been compromised and settled, the execution of renewal paper at a legal rate of interest is free of usury.[16] In *Hardin v. Grenada Bank*,[17] a majority of the court held the debt to be usurious on the theory that the facts justified the application of the first stated rule. A dissent by the chief justice was based on the viewpoint that the facts called for the application of the latter rule. The creditor committed two acts which were viewed by the court as being usurious and continuing thus throughout the life of the loan. An additional charge of two per cent was made on past-due paper, claimed by the lender to make a permissible gross rate, but denounced by the court as a device to avoid the usury statutes. Also, the borrower executed a note calling for ten per cent interest, a rate the lender contended that it did not intend to charge, and a two per cent credit was given to the borrower upon his complaint. The successive renewals of the debt thereafter did not debar the debtor's claim of usury. The case was extremely close on the facts with respect to whether there was a purge of the original usury. It must be observed that the dissenting opinion is supported by many legitimate inferences arising from the evidence and is entitled to favorable consideration.

D. Sales

Three cases involving the rights of parties to a sale were passed upon by the court. In the first a practical situation arose whereby, as a defense to a purchase-money suit, the defendant contended that the automobile sold by the plaintiff was represented to be a 1933 model but was actually a 1932 model, the value of which had already been received by the plaintiff.[18] The evidence sustained the claim of the defendant that the trade papers described the automobile as being of later manufacture that it really was. Holding the defendant was entitled to a peremptory instruction, the court declared that while there is no implied warranty in the sale of a used automobile, an express warranty that the car was of a certain year of manufacture was present in the written contract of sale. Because of the breach of warranty, the vendor was pre-

[15]Torrey v. Grant, 10 Sm. & M. 89 (1848).
[16]See authorities collected in (1919) 13 A. L. R. 1220.
[17]180 So. 805 (Miss. 1938).
[18]Williams v. McLain, 180 Miss. 6, 176 So. 717 (1937).

cluded from recovering the difference in value between a 1932 and a 1933 model automobile. This would be the measure of damages if the purchaser sued on the warranty.[19] It was immaterial to the court that the buyer had inspected the motor vehicle before purchase thereof because of his right to rely upon the seller's representation as to the date of its manufacture.[20]

In *Viking Refrigerators, Inc. v. Farrell*[21] the seller of a refrigerator display case was denied recovery in a purchase-money suit against the purchaser on the theory of being responsible under an implied warranty that the chattel would reasonably perform the services for which it was made. The seller contended that the buyer had accepted the case and had used it for more than five days, which, under its sales contract, exonerated the vendor of all responsibility. It was held that this provision had been waived by the seller's undertaking to repair the refrigerator, advising with the purchaser about it, and agreeing to make the refrigerator satisfactory or to furnish another case. The court applied the principle of waiver on the authority of *Fay & Egan Co. v. Cohn & Bros.*[22]

Construing a contract of sale according to the laws of Arkansas, where the contract was made and was to be performed, the court held that the parties had ratified and renewed a Sunday-made contract, making it valid under the decisions of that state without further consideration therefor.[23] Apparently the same result would be reached in a majority of jurisdictions.[24] But, in the absence of a new consideration therefor, the illegal contract could not be ratified and validated under the law of Mississippi and that of several other states.[25]

E. Fraud

The applicant for purchase of tax-forfeited lands owned by the State of Mississippi is under a duty to furnish the officer in charge of the disposal of state lands with full and accurate information as to the character and value of the particular land applied for by the purchaser.[26] If the patentee, either knowingly or ignorantly, falsely represents the valuation and quality of the land in

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[19]Baker & McDowell Hardware Co. v. Ellis, 149 Miss. 257, 115 So. 425 (1928).

[20]42 C. J. § 313, at 778.

[21]180 Miss. 181, 176 So. 910 (1938).

[22]158 Miss. 733, 130 So. 290 (1930).

[23]W. F. Moody & Co. v. Boyle Gin Co., Inc., 180 Miss. 523, 177 So. 654 (1937).

[24]60 C. J. § 73, at 1114.

[25]Kountz v. Price, 40 Miss. 341 (1866) and see 60 C. J. § 73, at 1114.

[26]Streeter v. State ex rel. Moore, 180 Miss. 31, 177 So. 54 (1938).

the application for purchase thereof, the patent is subject to cancellation on the ground of fraud. If the patentee would contend that the public officer knew that the land was incorrectly represented, he must affirmatively prove such to be the case for there is no presumption that an officer acts improperly. The further intimation was made that, even if it could be shown that the officer knowingly sold the land at an absurdly low price, in such event his acts would not bind the state from proceeding to set aside a patent thus issued. The case is interesting from the standpoint of approving title to lands purchased from the state. Any certificate thereon should be safely based on a condition that the applicant represented the true facts to the officer and that the valuation placed thereon by the officer for purposes of sales was not a gross discrepancy from the actual value.

IV.

CRIMINAL LAW

*Jamie L. Whitten**

Comparatively few criminal cases were passed on by the Supreme Court at the September Term, 1937 and the March Term, 1938. In only a small number of these cases did the decision of the court make any change in criminal procedure, announce new law or advance accepted principles into new fields. However, two of these decisions occasion more than passing interest.

A. Right of Governor to Call Out National Guard in Peace Time

In *State v. McPhail*,[1] the court had before it the question of the legality of Governor White's act in calling out the National Guard to enforce the criminal laws in Rankin County.

The proof showed that in Rankin County, adjoining Hinds County, intoxicating liquor was offered for sale and wide open gambling was permitted over a considerable time and in numerous places. On numerous occasions local officers had been called on to alleviate such conditions and to enforce the law. They either could not or would not relieve this condition. This territory became somewhat notorious under the name "Gold Coast"; the lawless conditions there a matter of general public knowledge.

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[1]180 So. 387 (Miss. 1938).

On December 8, 1936, Governor White issued an executive order reciting "in view of the conditions existing in East Jackson, Rankin County, Mississippi," it was deemed necessary to send therein a sufficient detachment of National Guard "for the purpose of assisting in the enforcement of the criminal laws of the state." A detachment was sent to this section under the Adjutant General, and, a proper warrant having been procured, a search of the appellant's premises was conducted.

Much intoxicating liquor was found and other evidence obtained that such place was a nuisance. The district attorney filed and prosecuted his bill to abate the place of business as a common nuisance, using the evidence obtained by the National Guard.

Upon the hearing the chancellor sustained the objection of the appellant to the introduction of this evidence on the ground that it was illegally obtained, and that no such emergency existed as to authorize the governor to call out the National Guard. The bill was dismissed and the state appealed.

The court, in its opinion, stated the condition mentioned in Rankin County was so notorious, flagrant and open, and of such general interest and so generally discussed that with other evidence in the case, the court would and did take judicial notice of the deplorable conditions there as current history, and of the further fact that local officers were not enforcing the law, either because they could not or would not.

On the question of the legality of the governor's act and of those acting under his authority, the court cited Section 123, Mississippi Constitution of 1890: "The governor shall see that the laws are faithfully executed."; Section 217: "The governor shall be commander-in-chief of the militia, ... and shall have power to call forth the militia to execute the laws, repel invasion and to suppress riots and insurrections."; Article 9, which provides for state militia and its maintenance; and Section 4817, Mississippi Code of 1930, which provides that the governor "may call out the militia to execute the laws to suppress insurrections or riots and to repel invasion," and further, that part of Section 9 of the Constitution of 1890 which provides that "the military shall be in strict subordination to the civil power."

The court then held that the meaning of all these sections, taken together, is that whatever the governor, or members of the militia, do under his authority, must be done as civil officers and in strict subordination to the general laws of the land.

After stating that the governor is an executive officer in every county of the state, the opinion continues: "A fair measure of

deference must be accorded to local authorities, but when, as here, the governor has sought by representations to and requests of, the local authorities that the law be enforced and they fail to do so; when their failure becomes tantamount in substantial results to a refusal or to no more than a futile pretense; when that condition exists for a length of time which makes it clear that no dependence is to be placed upon the local executive officers and that they cannot or will not enforce the laws . . . . then the power and the duty of the governor arises to send the executive agents . . . . to-wit, the militia, not only to supersede the law but to enforce it, the members of the militia to perform the duties which the local executive officers would and could have done . . ."

The court proceeded to hold that on the proof the governor had the right to call out the militia; the act of the National Guard in making affidavit for a search and in executing and returning the same was valid; and the chancellor erred in refusing to admit the evidence thus obtained.

Thus from the court's opinion the state is larger than any one county, the governor larger than any local executive officer, when that county and its local executive officers either cannot or will not enforce the law.

B. Coram Nobis

The other case which gains more than passing note is that of *Mitchell v. State.*[2] William C. Mitchell was convicted of the murder of a negro and sentenced to hang. On appeal the case was affirmed. A reprieve was granted the defendant by the governor on request of counsel and in the ensuing mental examination, the defendant was declared sane. Just a few days before the date of execution, while the trial judge was out of the state due to illness, Michell filed a petition for a writ of *coram nobis* in the circuit court of another district. This court ordered a stay of execution and issued the writ of *coram nobis*, without notice to the state, for the sole purpose of determining at the next term of court the sanity of the defendant.

At the hearing the district attorney filed what was termed a motion to vacate and dismiss the order and writ of the circuit court on several grounds, the most important being: (1) that said order was issued by said circuit judge without any notice to the state, and (2) that the question of the insanity of the defendant was *res adjudicata.*

The court in its opinion recognized the necessity of taking some action to end the practice of issuing little used and nearly

[2]179 Miss. 874, 176 So. 743 (1937).

obsolete writs as the hangman's noose approached. Said the court: "We have reached the point where it becomes the solemn obligation of this court to close some of the doors to the field by which judgments of conviction with death sentences may be made footballs, to be tossed from court to court, from one delay to another."

The court then proceeded to announce the law in regard to the writ and its use in Mississippi, and although recognizing such writ, the court announces certain limitations on its use: (1) A writ of error *coram nobis* cannot issue except on notice to opposite party. (2) Where application for such writ is made in vacation and such action is to be taken thereon as to strike from the judgment a material portion thereof so that it will be necessary for the stricken portion to be restored by a subsequent judgment in term time, a reasonable notice must be given opposite party to the same extent as is necessary before the court can hear the petition on its merits. (3) To warrant conviction for crime, the judgment must comprehend the issues that accused at time of commission of offense and at time of trial was of sufficient mental soundness to be held to criminal accountability and to be subject to a trial therefor. Thus when a verdict of guilt and judgment of condemnation have been returned and entered, such action is *res adjudicata* of issue of mental soundness. (4) Thus for insanity to be a subject for issuance of writ of error *coram nobis* it must have developed since time of trial. (5) Though an insane person can have no contractual agent, he may have an agent appointed by law.

The specially concurring opinion of Chief Justice Smith is worthy of note. "No writ of error *coram nobis* is necessary, as this court has more than once said, and if members of the bar and trial judges would only remember and act on this, much trouble would be saved them and this court. A motion or petition to vacate a judgment rendered at a former term is the initial pleading in a new proceeding, civil in its nature, and notice must be given the opposite party . . . . The sufficiency of the motion may be challenged by a demurrer, or its allegations may be traversed, or facts in bar thereof may be pleaded, to which the movant may reply. Issues of fact should then be tried by a jury."

This procedure gives understandable remedy for error of fact of which the trial court was ignorant at the time of its judgment, and of such consequence as to have caused the court not to render its judgment, had it been advised.

Since defendants are not always in search of simple and understandable procedure as outlined by Chief Justice Smith, it might be

wise to bar the writ of error *coram nobis* from Mississippi practice by legislative enactment.

C. Homicide

In *Church v. State*,[3] the court again announced the rule that before a witness can be impeached by a previous statement, a proper predicate must be laid. The witness must be appraised of the time, place and persons present and of the particular impeaching matter.

In this case evidence of the statement of defendant at the coroner's inquest was offered. The court held such statement admissible only if the defendant *voluntarily* appeared and testified, but not admissible if the witness was subpoenaed.

In *Coleman v. State*,[4] the court reannounced the rule that before the right of self defense can be cut off from the defendant because the defendant went into the difficulty armed, the jury must believe beyond a reasonable doubt that the defendant armed himself with a deadly weapon with the intent to provoke the difficulty and to use such deadly weapon, if necessary, to overcome his adversary.

In *Conner v. State*,[5] the defendant struck the deceased, dazing him, and causing him to stagger against a third person who pushed him in an effort to straighten him up. Deceased, still dazed and staggering, took a few steps and fell against a projection on an iron post and was killed. It was argued by counsel for the defendant that the cause of deceased's death was the act of the third party in pushing the deceased. The court held that the wrongful force put into effect by the defendant continued in progress until the final injury, since the push by the third person would have been harmless except for the deceased's condition. For an intervening cause to excuse the perpetrator of the original wrong, such intervening cause must be an efficient cause.

In *Butler v. State*,[6] the state was permitted to contradict the defendant on certain statements he was alleged to have made tending to show that he and the deceased were on good terms just prior to the time of the killing, whereas defendant had shown on trial that deceased had threatened the defendant's life. The court, in holding such contradiction admissible, said: "The test as to whether

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[3]179 Miss. 440, 176 So. 162 (1937).
[4]179 Miss. 661, 176 So. 714 (1937).
[5]179 Miss. 795, 177 So. 46 (1938).
[6]179 Miss. 865, 175 So. 589 (1937).

matter inquired of on cross examination of witness in respect of collateral matter, is whether the state would have been permitted to prove matter as part of its case."

In *Armstrong v. State*,[7] the court refused to pass on the question of whether voluntary intoxication so complete as to render the defendant incapable of entertaining a malicious intent would reduce a homicide from murder to manslaughter on the ground that evidence warranted the jury in believing the defendant was not intoxicated. It is to be noted that in *Edwards v. State*,[8] where the court held that such intoxication would prevent a person from being guilty of larceny on the ground that a specific intent to steal is necessary in such crime of larceny, by inference, the court held the same to be true of murder though not of manslaughter.

In *Hitt v. State*,[9] a county prosecuting attorney was held not to be a "judicial officer" within the meaning of the rule that confession to a judicial officer is incompetent, unless warning be given that confession will be used against the defendant.

Howard v. State[10] held that flight of the defendant may be considered by the jury along with other evidence, but is not substantial evidence of guilt since it is consistent with innocence as well as guilt.

D. Possession of Intoxicating Liquor

As usual, much of the time of the court was taken up with the question of legality of search warrants in liquor cases. Practically all of these cases merely recite accepted principles: that affiant, in making affidavit for search warrant must state, as required by statute, that "he has good cause to believe and does believe," rather than "suspects," and that an officer has a right to arrest a person for a crime committed in his presence. Incident to the arrest, the man's person may be searched, and he is subject to prosecution for liquor found on his person, *etc.*

In *Johnson v. City of Aberdeen*,[11] the court held words "contrary to the form of the statute in such case made and provided and against the peace and dignity of the city of Aberdeen" were not sufficient to show that an ordinance of the city of Aberdeen had been violated.

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[7]180 So. 69 (Miss. 1938).
[8]178 Miss. 696, 174 So. 57 (1937).
[9]181 So. 331 (Miss. 1938).
[10]181 So. 525 (Miss. 1938).
[11]179 Miss. 526, 176 So. 262 (1937).

E. Obtaining Money or Thing of Value by False Pretense

In the case of *Hinman v. State*,[12] the defendant received a check which he knew did not belong to him. He indorsed the check, deposited it with his bank, and drew checks against such account when he had no other funds therein except the proceeds of the aforesaid check. The court held that the defendant's action constituted the crime of obtaining money under false pretenses.

F. Grand Larceny

In *Duke v. State*,[13] where the possession of personalty is fraudulently obtained from an owner who intends that possession and ownership should pass to the other party or that ownership should pass to a third person, the party who obtains possession is not guilty of larceny, even if title is reserved until the balance of the purchase money is paid, such reservation of title being merely a security for the balance.

G. Bigamy

In *Bryant v. State*, [14] the indictment charged that the defendant married a named person "being then and there legally married to another." The defendant contended that the indictment should charge that the person to whom he was first married was living. The court held that this was unnecessary as the fact must be implied from the words "then and there being legally married."

In *Creed v. State*,[15] where the defendant was convicted on the uncorroborated testimony of an accomplice, he appealed on the ground that the testimony of the accomplice was contradictory, unreasonable and improbable, and that such accomplice was unworthy of belief. The court recognized the rule that a defendant may be convicted on the uncorroborated testimony of an accomplice, but also stated that a conviction would not be allowed to stand on the uncorroborated testimony of an accomplice where such testimony was unreasonable, improbable and contradictory.

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[12]179 Miss. 503, 176 So. 264 (1937).
[13]181 So. 518 (Miss. 1938).
[14]179 Miss. 739, 176 So. 590 (1937).
[15]179 Miss. 700, 176 So. 596 (1937).

V.
EVIDENCE

*Frederick C. Berger**

A. Relevancy, Materiality and Competency

(1) In General

In *Graves v. Johnson*,[1] defendant, in plaintiff's suit for wrongful death of decedent, introduced evidence that decedent, at the time of his death, was intoxicated. Plaintiff's witnesses in rebuttal testified that decedent was not intoxicated, and further (a) that the decedent was a careful driver; (b) that by habit he was a sober man; and (c) that his general reputation for sobriety was good. The court, following the general rule in civil cases, held the evidence inadmissible since it was an attempt to strengthen plaintiff's position by offering evidence of good character when character or reputation was not a material issue.[2] The court could have possibly admitted the testimony as evidence of a habit having relevant effect upon conduct, thus not coming under the rule against moral character.[3]

(2) Res Gestae

In *Crosby v. Columbus & G. Ry. Co.*,[4] the action was against defendant railroad company for injuries alleged to have been sustained when window in defendant's car fell on the arm of plaintiff. The plaintiff attempted to show that the conductor had admitted, after the occurrence, that the window catch was defective. Following the general rule in this state the court held the evidence inadmissible, since it was made after the occurence and was not part of the *res gestae*. Although our court has stated the general principles applicable toward determining the admissibility of evidence as part of the *res gestae*,[5] there has never been any definite test applicable. The doctrine of *res gestae* has been severely criticized by some of our leading text writers, but it seems to serve a

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[1]179 Miss. 465, 176 So. 256 (1937).

[2]Wigmore, Evidence (2d ed. 1923) §§ 92, 93, 96.

[3]Wigmore, Evidence (2d ed. 1923) §§ 92, 93, 96.

[4]181 So. 139 (Miss. 1938).

[5]In Mayes v. State, 64 Miss. 329, 1 So. 733 (1887) Judge Cooper said: "The true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair. In the one case it is competent; in the other it is not." This doctrine was reiterated by the court in Simon v. Dixie Greyhound Lines, 179 Miss. 568, 176 So. 160 (1937).

very useful purpose since it broadens the discretionary powers of the trial court.

B. Judicial Notice

In *Favre v. Louisville & N. R. Co.*,[6] the plaintiff brought suit in Hancock County for the wrongful death of decedent. Defendant filed petition requesting a change of venue, alleging that the plaintiff was also the circuit clerk in that county. The trial court granted the request without there having been offered any evidence.

On appeal the court held that the trial court properly took judicial notice of who is its clerk. This follows the almost universal holding that a fact concerning the organization, incumbency, or proceeding of courts may be judicially noticed, and this includes incumbents of office, sheriffs, attorneys, and other officers.[7]

In *Martin v. Board of Supervisors of Winston County*,[8] the court was asked to take judicial notice of the 1935 primary election return and that persons voting in that primary election were primary electors. The question had not previously been decided in this state. The court refused to extend the doctrine of judicial notice to include electors although it would no doubt judicially notice the primary election itself if that had been an issue.[9]

C. Witnesses

(1) Impeachment

In *Jones v. State*,[10] defendant and Watkins, suspected of stealing hogs, were indicted for grand larceny and tried separately. Subsequent to the arrest of defendant the witness Watkins, outside of the presence of the defendant, had approached the owner of the hogs alleged to have been stolen with a proposition to pay for the hogs. The state introduced testimony of the owner to impeach Watkin's testimony. Following the general rule the court held the evidence inadmissible as an attempt to impeach witness about an immaterial or collateral matter since the testimony, if offered against the defendant, would have been incompetent.[11]

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[6]180 Miss. 843, 178 So. 327 (1938).
[7]Wigmore, Evidence (2d ed. 1923) § 3123.
[8]178 So. 315 (Miss. 1938).
[9]It should be noted that the possibility of error in qualification of electors is very great.
[10]180 Miss. 210, 177 So. 35 (1937).
[11]Cofer v. State, 158 Miss. 493, 130 So. 511 (1930).

(2) Character and Conduct

In *Turberville v. State*,[12] the defendant and his brother were charged with a crime and indicted. They were tried jointly. On cross examination the district attorney asked defendant's brother whether or not there were other indictments pending against him. He was permitted to answer. Although this exact question has never been passed on by our court the principle involved is clearly established by numerous decisions[13] holding that such a question is not included under section 1532, Mississippi Code of 1930,[14] which provides that a witness may be examined touching "his conviction of any crime" since this section narrows the rule of exclusion only to the extent of allowing examinations as to convictions. The question therefore being highly prejudicial,[15] it alone was sufficient to warrant a reversal.

D. Documentary Evidence

(1) Certified Copies

In *Life and Casualty Company v. Walters*,[16] the terms of the insurance policy exempted defendant company from liability if death was the result of pregnancy existing at the time of the issuing of the policy. The defendant, in an attempt to bring the death of the deceased under the above clause, introduced under section 4908, Mississippi Code of 1930[17] certified copies from the records of the State Board of Health which contained report of doctor's opinion as to condition and cause of death. A student nurse who was present at delivery was allowed to testify as to the condition of the child when born. The plaintiff claims evidence should have been excluded because of the state's Privileged Communication statute.[18] The court held the statutes were not conflicting and that the evidence should have been admitted since the purpose of the Privileged Communication statute was to protect confidential matters growing out of the relation of physician and his assistants and patients, and when such are required by law to be made a part of public records there is no longer reason for their privacy. The record of the office of Vital Statistics, being access-

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[12]179 So. 340 (Miss. 1938).

[13]Starling v. State, 89 Miss. 328, 42 So. 798 (1907). For collection of cases see Cent. Dig. Vol. 50, Witnesses, §§ 1126, 1128, 1132. Wigmore, Evidence (2d ed. 1923) § 982.

[14]Miss. Code Ann. (1930) § 1532.

[15]No request was made to have court instruct jury to disregard such question.

[16]180 Miss. 384, 177 So. 47 (1937).

[17]Miss. Code Ann. (1930) § 4908.

[18]Miss. Code Ann. (1930) § 1536.

ible to the public, are no longer confidential. In holding the nurse's testimony admissible as being those of an independent person, the court quoted Wigmore and said: "A nurse as an independent person, receiving medical confidence as such, is not within the privilege."[19] This seems to be the present majority view.

In *Mcloed v. Bridges*,[20] the court held that a certificate of register of the Arkansas Bureau of Vital Statistics, showing that Harry Philips had died at the described time and place in Arkansas, was receivable in evidence under sec. 1585, Mississippi Code of 1930, which authorizes admission of foreign registers of deaths as proof of the fact of death.[21]

E. Parol Evidence

In *Tullos v. Town of Magee*,[22] plaintiff sold certain land on which there was a water pump to the town. The deed recited sufficient consideration but plaintiff brings this suit and attempted to prove by parol agreement that the town was to employ him for life to operate this pump, and that this was part of the consideration for the deed. The court, following the rule that has long been in effect in this state, held that parol evidence is not admissible to add to the contractual obligations contained in a written instrument when no question of fraud is presented.[23]

Aaronson v. McGowan,[24] holds that a notation on a check stipulating that it is to go on 1931 rent is, in the absence of fraud, conclusive and parol evidence is not admissible to show that it was intended to go on rent for another year.

In *Stone v. Grenada Grocery Company*,[25] trustee brought an action for conversion of cotton sold to defendants by the grower after the execution of a deed of trust to the bank on printed form containing provision that property covered included crops to be grown. The defendant attempted to show by oral agreement that when the trust deed was executed the bank agreed that it should not cover crops to be raised and that the grower did not intend to

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[19]180 Miss. 384, 177 So. 47 at 49 (1937). See Wigmore, Evidence (2d ed. 1923) § 2557.

[20]180 Miss. 585, 178 So. 321 (1938). See Davis v. Rhodes, 39 Miss. 152 (1860); *cf.* Johnson v. Martin, 68 Miss. 330, 8 So. 847 (1891).

[21]Miss. Code Ann. (1930) § 1585.

[22]179 So. 557 (Miss. 1938).

[23]Baum v. Lynn, 72 Miss. 932, 18 So. 428, 30 L. R. A. 441 (1895); Martin v. Partee, 121 Miss. 482, 83 So. 673 (1920) held parol evidence inadmissible to show that grantee agreed to pay taxes for current year as part of consideration where conveyance contained warranty against incumbrances.

[24]180 So. 738 (Miss. 1938).

[25]180 Miss. 566, 178 So. 107 (1938).

include such crops. In holding the evidence inadmissible under the rule excluding parol evidence to vary or contradict written instruments the court applied the rule not only to parties to the instrument but also to their privies. The decision is in accord with the weight of authority.[26]

Fornea v. Goodyear Yellow Pine Co.[27] reiterates the doctrine that where written contract is procured by fraud the other party may show true facts, and the contract will be avoided on the theory that no contract legally exists where it is procured by fraud.[28]

F. Opinion Evidence

(1) Weight and Sufficiency

In *Yazoo & M. V. R. R. Co. v. Lamendorf*,[29] the plaintiff was killed in a train wreck. Defendant, in plaintiff's suit for wrongful death of decedent, introduced a number of witnesses who stated that the whistle did blow. Plaintiff's witnesses testified that they did not know whether it blew or not because their attention was elsewhere at the time. One of plaintiff's witnesses testified that the deceased was stalled upon the railroad track for a period of forty seconds, within which time defendant could easily have stopped before reaching the crossing. The court held that the corroborating testimony of the affirmative was sufficient to overcome the evidence of the plaintiff since it was negative testimony, and that the court should have granted a peremptory instruction for the defendant.

On suggestion of error[30] the attention of the court was called to the fact that one witness had testified that the train could have easily stopped and that this was sufficient to warrant the trial court in sending the case to jury. In a clear and convincing opinion the court held that the testimony of the plaintiff's witness, when taken with all the other evidence, would have been possible but not probable; that the scintilla of evidence rule has been discarded in nearly all jurisdictions and is not recognized in this state, but verdicts must be based upon substantial evidence and that evidence must be reasonably believable.[31]

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[26]Allen v. Allen, 175 Miss. 735, 168 So. 658 (1936).

[27]178 So. 914 (Miss. 1938).

[28]English v. N. O. & N. E. R. Co., 100 Miss 809, 57 So. 223 (1912); Jourdan v. Albritton, 146 Miss. 651, 111 So. 591 (1926). The instant case also held that the privileged communication statute might be waived by contract.

[29]180 Miss. 426, 177 So. 50 (1937).

[30]180 Miss. 426, 178 So. 80 (1938).

[31]See Y. & M. V. R. Co. v. Beasley, 158 Miss. 370, 130 So. 499 (1930). *Cf.* Columbus & G. R. Co. v. Lee, 149 Miss. 543, 115 So. 782 (1928).

This is as clear and direct a declaration as could be wished and it should remove all doubt as to how our court stands on the scintilla of evidence rule. The decision is in accord with the majority and more reasonable holdings, and our court therefore deserves the commendation of all those interested in the progress of the law of evidence.

In *Albert v. Doullut & Ewin*,[32] plaintiff brought suit against defendant construction company for the wrongful death of decedent who was killed by a falling tree. The question in controversy was whether or not a warning had been given. The warning was to have been made by having the men shout "tree falling" or "timber". Defendant's witnesses testified that warning was given, while plaintiff's witnesses testified that they were within from twenty to one hundred feet of where the tree was being felled and if any warning was given they did not hear it; and if it had been given, they would have heard it. The trial court held this evidence was negative and not sufficient to make an issue for the jury as against the postive testimony that the warning was given.

Following the majority view the court held that a jury question was presented since testimony that a fact did not occur given by witnesses *so situated* that in the ordinary course of events they would have heard or seen the fact had it occured is sufficient to warrant jury in finding that the fact did occur.[33]

In *Jackson County v. Meaut*,[34] plaintiff brought action for the death of his cattle alleged to have died from pneumonia caused by dipping in defendant's vat. Plaintiff testified that they died from pneumonia and the defendant objected to his testimony on the ground that he did not qualify as an expert. Following the majority and almost universal view the court held the testimony properly admissible for what it was worth, and not as expert testimony based on knowledge of the facts, experience and observation.[35]

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[32]180 Miss. 626, 178 So. 312 (1938).

[33]Grantham v. Gulf R. R. Co., 138 Miss. 360, 103 So. 131 (1925); WIGMORE, EVIDENCE (2d ed. 1923) § 664. Whether or not the witnesses were "so situated" is always the paramount question. Thus the case can be distinguished from Y. & M. V. R. R. Co. v. Lamensdorf, 180 Miss. 426, 177 So. 50 (1937).

[34]179 So. 343 (Miss. 1938).

[35]Hardaway Contracting Co. v. Rivers, 180 So. 800 (Miss. 1938).

VI.

INSURANCE

*O. B. Triplett, Jr.**

A. Introductory

The general purpose of the business of insurance is to distribute the risks of loss from the innumerable perils that beset man among a large number of those who are exposed to similar perils. Through seven centuries the business has developed with an incredibly rapid growth and has been extended to cover almost every risk to which members of a highly complex society are exposed.

The function of the courts, in solving the legal relations flowing from the insurance contract, is to determine a proper application of the principles of general contract law to the peculiar conditions under which insurance contracts are usually executed, making proper modifications of the general law to meet existing social needs.

The decisions of the Supreme Court, rendered during the past year, afford to the bar an excellent opportunity to observe the purpose and nature of the insurance contract, the methods used by the insurer in limiting and controlling the risk insured, and other related subjects.

B. Insurable Interest

Neely v. Pigford:[1] The requirement of an insurable interest to support a contract of insurance is founded upon a public policy which condemns as a "wager" every agreement for insurance of any subject in which the assured has no present or expectable pecuniary interest. In *Neely v. Pigford* the doctrine was extended to meet a modern and enlightened social need. The employer, Neely, had procured 191 accident policies on his 191 employees, insuring himself as beneficiary, against any accident befalling them. Because employers in this age do not first stop to inquire whether they are legally liable for injury or death to their employees, but customarily provide them with medical attention and assume the expense of burial if death occurs, the court held that an employer following such custom has an interest in his employees and may lawfully insure it against injuries for which he is not liable. The court further held that this point is one which the insurer alone may arise for decision.

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[1]178 So. 913 (Miss. 1938)

The decision is illustrative of one of the marked distinctions between the rules affecting insurable interest in property and life, respectively. In property insurance, the expectation of benefit to be derived from its continued existence must have a basis of legal right; yet the expectation of benefit to be derived from the continued existence of a life need have no legal basis whatever. In life insurance it is enough if the relation between the assured and insured, whether by blood, marriage or commercial dealings, is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life insured, or, as in Pigford's case, of suffering detriment or incurring liability through its termination.

C. Nature of Insurance Contracts

Collette v. Long:[2] The owner of an undivided one fifth interest therein insured a certain house and all furniture therein against tornado damage. Despite the fact that the coverage was not limited to the separate interest of the co-tenant the court held that the remaining co-tenants had no interest in the proceeds of the policy payable on account of tornado loss because policies of insurance are contracts between insurers and the assured for indemnity of the assured, and not for loss or damages which another person may have sustained because of the destruction of the policy.

Magee v. Sun Life Assur. Co. of Canada:[3] As in the case of any other contract, the rights arising out of a contract of insurance, whether of the immediate parties or those claiming through them, are usually to be determined by a reasonable construction of the contract itself. Magee's employer had taken out group insurance for the benefit of his wife. The policy provided that the insurance should cease when notice was given by the employer that employment had terminated. No notice of cancellation to Magee was given nor did the policy provide therefor. The court, in effect, held that the employer was clothed with an absolute power of termination, and that a legitimate exercise of it effectually cancelled the contract.

Burkett v. Globe Indemnity Co.:[4] The Louisiana statute relating to liability insurance policies and authorizing a right of direct action against the insured creates not only a procedural right but a right of action against the insurer in favor of third persons not parties to the contract, for whose ultimate benefit the insurance may be said to have been procured. Because of the

[2]179 Miss. 650, 176 So. 528 (1937).
[3]180 So. 797 (Miss. 1938).
[4]181 So. 316 (Miss. 1938).

substantive nature of such a right of action, asserted by Burkett in Mississippi, it was recognized and held enforceable. It would seem that the statute creates an all inclusive class of contingent beneficiaries.

D. Forfeitures

Universal Life Ins. Co. v. Ford:[5] A provision is usually to be found in life policies to the effect that in case of nonpayment of premiums in the manner and at the times stipulated, the contract shall become "void". Such a provision invests the insurer with a destructive power of forfeiture, and is regarded with disfavor by the courts.

Upon the assumption that the insured desired a maximum of insurance protection from the insurer, the courts have held with unanimity that, so long as the insured is possessed of money absolutely due and owing to the insured, the privilege to exercise the power of forfeiture is defeated, and a legal duty to maintain the full insurance protection rests on the insurer. These were the principles applied in Monroe Ford's case. When he failed to pay his weekly premium the insurer was indebted to him on account of his prior disability; and the court enforced the duty imposed on the insurer for the prevention of unjust forfeitures.

Callender v. Lamar Life Ins. Co.:[6] There are other circumstances under which the insurer may be legally disabled from exercising a destructive power of forfeiture. Thus it would be manifestly unjust to allow the insurer to assert a forfeiture for nonpayment of a premium due when the failure to pay was due to any wrongful conduct of the insurer. Such an instance was presented by the pleadings in the *Callender* case, wherein the declaration alleged that the insurer declined to accept a premium of the insured although he had paid same within the grace period to an agent authorized by the insurer to collect premiums—the insurer apparently refusing same for the reason that the premium did not reach the home office until the grace period had expired.

E. Remedies for Wrongful Cancellation

Callender v. Lamar Life Ins. Co.:[7] The court held that proof of the wrongful refusal of tendered premiums by the insurer would create three alternative remedies which the insured might pursue: (1) to ignore the cancellation and keep the policy in force by paying or offering to pay the premiums thereafter becoming

[5]180 So. 823 (Miss. 1938).
[6]182 So. 119 (Miss. 1938).
[7]182 So. 119 (Miss. 1938).

due; (2) to sue in equity to set aside the cancellation; or (3) to treat the cancellation as an anticipatory breach of the contract and sue for the damages thereby sustained by him.

The insured, William C. Callender, elected the first of these options; and the court remarked that if the acts and declarations of an insurer in declaring a wrongful forfeiture indicated that a tender would not be accepted, or if it has declared a forfeiture and refuses the premiums as it did in Callender's case, the fact that there has been a failure subsequently to pay or tender the premiums as they fall due will not prevent a recovery on the policy.

F. Waivers by Insurance Agents

Ordinarily, it may be said that any party to a contract may waive any benefit given to him thereby; and in contract of insurance the insurer may waive the benefit of any provision of the policy. And as insurers usually act through agents, the insurer may, by the act of any competent agent, waive the benefit of a provision of the policy prohibiting waivers, save in a specified manner. Likewise any competent agent of a mutual benefit society can waive those benefits created by the by-laws of the society to which the members have assented, or, even those existing under the constitution of the society, but not those created by the charter of incorporation. And in determining when an agent has sufficient authority to waive the benefit of a policy provision, limitations by the insurer on the authority of the agent are improper if they are unreasonable, as involving an untruth, or if they are contrary to public policy, or in conflict with a governing statute or rule of law. Three cases decided by our Supreme Court turned on questions of waiver.

Saucier v. Life & Cas. Ins. Co. of Tenn.:[8] The policy involved in this case provided: (1) that prepayment of the first premium was a condition precedent to an assumption of risk by the insurer; and (2) that only certain stated officers could make or modify the contract. Nevertheless, the agent intrusted by the insurer to deliver the policy and receive payment of the first premium, waived its prepayment and made a complete and unconditional delivery of the policy. The court held that, on the declaration, the delivering agent was a general agent, and, therefore, had power to waive the condition attached to the insurer's offer. The court further held that an attempt to limit the authority of a general agent is an unreasonable and improper limitation, being contrary to truth.

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[8]179 So. 851 (Miss. 1938).

Afro-American Sons and Daughters v. Williams:[9] In this case the charter of the society limited membership to those not over 60 years of age; and the constitution further limited some to age 55. It was held that the constitutional age limit could be waived by a competent agent, but that an attempt by the corporation or any agent thereof to waive the charter limitation was *ultra vires* and void.

Capital Paint & Glass Co. v. St. Paul Mercury Indemnity Co.:[10] This case also involved an improper limitation upon the authority of the insurer's agents. An indemnity policy provided (1) that the insured should not voluntarily assume any liability, and (2) that only stated officers could waive the policy provisions. An employee of the assured was personally injured; and the insurer's adjusters agreed as a condition attached to a settlement with the assured, that the insurer would reimburse him for money theretofore paid by assured to the injured employee with the consent and request of the adjusters. Section 5196, Mississippi Code of 1930, *ipso facto*, clothed the adjusters with general authority; and the attempted limitations were therefore in conflict therewith and void upon considerations of public policy.

G. Risk Controlling Devices

(1) General Principles

In entering into a contract so aleatory and hazardous as that of insurance, the insurer has four primary concerns: (1) to correctly estimate the risk; (2) to delimit the risk within a precise ambit; (3) to control the risk against an increase thereof; and (4) to obtain prompt and correct information of any loss occurring under the coverage.

The Supreme Court in the twelve months last past has been confronted with the several devices used by insurance companies in their efforts to attain these ends.

(2) Representations

To correctly estimate the risk the insurer usually relies upon the devices of concealment and representation, developed for the purpose of securing the same information as that possessed by the applicant. A more efficient device is illustrated hereinafter by *New York Life Ins. Co. v. Reedy*,[11] wherein words of delimitation were used and the incontestability clause therefore skillfully avoid-

[9]180 Miss. 14, 176 So. 725 (1937).
[10]180 Miss. 341, 176 So. 729 (1937).
[11]180 So. 607 (Miss. 1938).

ed; whereas, a use of the device of avoidance for misrepresentation would have been thereby precluded.

(3) Affirmative Warranties

Liverpool & London Globe Ins. Co. v. Fuston:[12] To delimit the risk assumed, the insurer often utilizes the device technically labelled "affirmative warranty." In the instant case the warranty involved was that of "sole and unconditional ownership" of the insured building, which fire had destroyed. The building was on leased ground; and no separate evidence of title to the building was offered. The court held that *prima facie* ownership of the building was shown to be in the lessor, precluding the lessee, as plaintiff, from a recovery.

(4) Words of Delimitation

(a) "Accidental Means"

North American Acc. Ins. Co. v. Henderson:[13] Insurance companies have been zealous and partially successful in an attempt to find a distinction between injury or death produced by "accident" and injury or death by "accidental means". In the *Henderson* case the insured attempted to step from a platform to the rear gate of his truck. His foot slipped on the gate and he fell in such violent manner as to cause an inguinal rupture. Our court, in permitting a recovery, decided that even though the insured "may be attempting to use the precise means which he intended to use, yet when and while in that use, and during the attempted execution of the purpose thereof, some undesigned, unintended, unexpected or unpremeditated deflection from, or interruption of, the intended use or purpose occurs, . . . this is an accident by 'accidental means', unless and except the deflection or interruption was obviously inevitable, or was inflicted with a negligence so gross as to be tantamount to intention."

Metropolitan Life Ins. Co. v. Williams:[14] Herein the insured is shown to have noticed a wound on his hand about which the skin was wrinkled and from which blood was oozing. An infection of the would produced septicemia resulting in death. There was no evidence offered to show how the injury was produced. The defense was that the injury was not produced by "accidental means." A construction of this term was solvable by Texas law, but the court applied Mississippi law in determining the procedure, and held that the cause of the insured's injury could be established by

[12]179 Miss. 809, 176 So. 913 (1937).
[13]180 Miss. 395, 177 So. 538 (1937).
[14]180 Miss. 894, 178 So. 477 (1938).

circumstances, and if it appeared to have been sustained through external and violent means, the injury was presumed to have been sustained through "accidental means."

The court further held that "if the accident is the proximate cause of the death, and sets in motion or starts a latent or dormant disease, and such disease merely contributes to the death after being so precipitated by the accident, it is not a proximate cause of death nor a contributing cause within the meaning of the terms of the policy."

New York Life Ins. Co. v. Wood:[15] The insured had been on a beer spree for a week before his death. To relieve a consequent nervousness he took, by mistake, an excessive dose of bromidia which had been prescribed by his physician. Death was the resultant; and an absence of "external, violent and accidental means" was the defense of the insurer in a suit for double indemnity under his life insurance policy. The court held the "means" to be "external, violent and accidental" within the meaning of the policy. The court added that death from taking poison by mistake does not prevent a recovery on such a policy.

These cases are all correctly decided. However, in the *Wood* case, the court undertook to distinguish the facts from those to be found in *Landress v. Phoenix Ins. Co.*,[16] wherein the death involved was produced by sunstroke. The court held therein that the means was natural though the result was accidental. When it is remembered that sunstroke is unsual—when the suddenness of its approach and its catastrophic nature are taken into account—a better view for our court to have taken would have been that the *Landress* case is unsound. Mr. Justice Cardozo dissented from the majority opinion, using this language: "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian bog. . . . When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means. . . . The insured did not do anything which, in its ordinary consequences, was fraught with danger . . . . he was playing golf in the same conditions in which he had often played before. The heat was not extraordinary; the exertion not unusual. By misadventure or accident, an external force, which had hitherto been beneficient, was transformed into a force of violence, as much so as a stroke of lightning. ——If there was no accident in the means there was none in the result, for the two were inseparable." This

[15]180 So. 819 (Miss. 1938).
[16]291 U. S. 491, 78 L. ed. 934 (1934).

reasoning is more in harmony with the ordinary interpretation and meaning to be placed on the phrase "accidental means."

(b) "Total Disability"

North American Acc. Ins. Co. v. Henderson:[17] The point taken by the insurer in this case was that appellee was not suffering with a "total and continuous disability" when submission to a minor operation would result in complete cure. The insured asserted his willingness to undergo the operation, but likewise his financial inability so to do. The court decided that the appellee was entitled to recover, since the rule requiring him to prevent or minimize his injury was one of reason, and his inability to take the needed step met the rule.

(c) "Professional Care"

North American Acc. Ins. Co. v. Henderson:[18] This case also construed the familiar provision in accident policies requiring continuous "professional care of a legally qualified physician," and announced as a rule of decision that this, also, is a rule of reason, holding that where there is nothing that a physician by professional care could do for the insured, regular attendance is without use or purpose, and the provision therefore disappears as a condition of legal liability.

(d) "Subsequent to the Delivery"

New York Life Ins. Co. v. Reedy:[19] In a life policy providing payment for disability occurring "subsequent to the delivery" thereof, it is incumbent upon the insured to prove that he became disabled after and not before the delivery of the policy. The incontestability clause does not relieve the insured of this burden but only prevents a contest of the validity of the policy. Such a provision was involved in the policies sued on in the instant case; and a judgment was rendered for the insurer because of the failure on Reedy's part to meet this burden of proof. It is interesting to note that the insurer did not seek to avoid liability because of a misrepresentation as to good health. Instead the policy language delimited and excluded liability under such circumstances; and in this manner the incontestibility clause could not be invoked.

(5) Exclusions

U. S. F. & G. Co. v. Cook:[20] Another device by which the insurer seeks to narrow the insurance coverage is the insertion of ex-

[17]180 Miss. 395, 177 So. 528 (1937).
[18]180 Miss. 395, 177 So. 528 (1937).
[19]180 So. 607 (Miss. 1938).
[20]179 So. 551 (Miss. 1938).

clusions in the policy. In the present case, Cook had expended attorney's fees and costs in defending an alleged employee's suit for personal injuries. Actually, in the action against Cook the plaintiff was an employee of the latter's subcontractor and not of Cook himself. The assured held a public liability policy, under which, by "Agreement A" of Section I, the insurer agreed to pay damages arising out of bodily injury accidentally sustained. Section II of the policy contained an agreement by insurer to defend any suit against assured seeking damages for bodily injury, even though such suit was "groundless, false or fraudulent." And Section IV contained an exclusion excepting liability for damage under "Agreement A" for bodily injury to an employee of the assured. The court held that the exclusion only limited the coverage under "Agreement A" in Section I, and did not affect the defense agreement in Section II.

Fidelity Phoenix Fire Ins. Co. v. Howard:[21] In this case Geo. R. Howard and H. G. Hawkins were partners. Under one partnership name they conducted a radio business, and in the same building they conducted an automobile business under a different partnership name. There was a complete separation of bookkeeping and of all operations and details respecting the business of the two partnerships. One of the partners in active management of both partnerships furnished a key to the building to an employee of the radio shop, who had no stated duties to perform for the motor company; and such employee entered the building and stole an automobile belonging to the motor company. This automobile was insured against theft "*for the benefit of Forest Motor Company,*" but the policy excluded any theft by one "in the assured's service or employment."

The assured contended (1) that the legal relations flowing from a partnership can best be solved by treating the partnership as a legal entity, and (2) that the insurer, by contracting to insure the partnership, Forest Motor Co. as such, was bound by its own election.

Without comment on the second ground, the court denied a recovery, holding that in legal contemplation the partnerships had no existence distinct from the members composing them. Therefore, the ownership and ultimate control of the insured automobile was vested in the two partners who were, on like reasoning, the employers of the thief.

The effect of the decision is to maintain a rule of decision denying the legal entity of partnerships, which rule is to serve in

[21]181 So. 846 (Miss. 1938).

the future determination of controversies arising in a mercantile world and which unquestionably gives full recognition to the legal entity of partnerships. The traditional concept of partnerships at common law, and not sociology, obviously guided the court to its decision.

(6) Promissory Warranties

The third concern of the insurer is to control the risk assumed under the insurance contract; and this is most frequently done by promissory warranties and conditions subsequent.

Central Manufacturers Mut. Ins. Co. v. Rosenblum:[22] A standard provision to be found in all fire insurance policies covering mercantile stocks is a promissory warranty known as the "iron safe clause". Under the terms of this clause the insured covenants to take an inventory at least once a year, or within one month after the policy is issued, if none has been taken within the preceding year. Also to keep a set of books showing all sales, both for cash and credit; and to preserve them in a fireproof safe, or other place protected against fire. In Rosenblum's case the court held that, to comply with this warranty, the assured must keep such a set of books as will enable an accountant to ascertain with reasonable accuracy therefrom, aided by the inventory, the value of all goods on hand at the time of fire. Rosenblum's books of account did not meet this test, and a recovery was denied him.

(7) Conditions Subsequent

Employer's Fire Ins. Co., v. Greenville Bank & Trust Co.:[23] This case involves the condition which makes the standard fire insurance policy voidable if the interest of the assured is terminated by sale or transfer. It appears in this instance, however, that Cadenhead had conditionally purchased the insured car from McHie Motor Company, and the policy listed Greenville Bank & Trust Company as an additional assured, with a sufficient statement in the policy to indicate that the bank held a purchase money lien on the car. Actually, the transfer of the conditional sales agreement from the motor company to the bank was not made until delivery of the policy was completed; but as the reason for the policy condition was not violated, the condition was not broken.

Winston v. Life & Casualty Ins. Co. of Tenn.:[24] One of the conditions in all policies is that nonpayment of premiums will render the policy voidable. This case merely holds that the insurer

[22]180 Miss. 485, 177 So. 909 (1938).
[23]180 Miss. 405, 177 So. 534 (1938).
[24]176 So. 527 (Miss. 1937).

was entitled to deduct from the amount of cash surrender value accrued to the insured a sum totaling certain premiums which had been paid by the insurer to keep the policy in force. If this act of the insurer was authorized, or if the cash value was increased by a sum equal to the total premiums thus paid, the court's decision seems to accord with equity. The opinion, however, is silent as to these facts.

(8) Conditions

In compelling prompt and correct information after loss has occurred under the coverages, the insurer usually resorts to two devices. One is a use of conditions subsequent, which have already been illustrated as a means of controlling the risk; the other, conditions precedent.

(a) Conditions Subsequent

State Mutual etc. Ins. Co. v. Watkins:[25] The automobile liability policy involved here excluded liability for bodily injury to the assured's employees. An injury occurred; and the injured party, at the time of the insurer's investigation, stated that he was an employee of the assured, whereupon the insurer denied liability. Thereafter, the injured party alleged this relationship in his declaration against the assured; but, during the trial of his action, he switched his position and asserted, by amendment, that he was not an employee. The insurer received no notification thereof.

The policy provided that the insurer should be immediately notified of any suit against assured for any damages or claim of damages as are covered by the policy, and that a failure to give such would render the policy void.

The court held that the provision was reasonable and was inserted to enable the insurer to make proper investigation and prepare a proper defense, stating that it is only when, and not until, some claim of liability is presented, which, under the terms of the claim, is within the coverage that notice need be thus given.

(b) Conditions Precedent

Protective Life Ins Co. v. Lamarque:[26] The group insurance policy here involved required the insured employee to furnish insurer with due proof that he was, before having attained the age of 60, wholly disabled by bodily injury in order to obtain disability payments. The policy was an Alabama contract; and our court, in recognition of the due process clause of the U. S. Constitution,

[25]180 So. 78 (Miss. 1938).
[26]180 Miss. 243, 177 So. 15 (1937).

was thereby compelled to hold that the furnishing of such proof was a condition precedent to insurer's liability under the policy, although the Mississippi rule, as announced in *Murray v. Metropolitan Life Ins. Co.*[27] was directly opposed thereto.

The Mississippi rule appears to be more in harmony with the purpose of the provision and more likely to prevent inequitable results therefrom. A fair analysis of all such provisions in life insurance contracts would yield a clear distinction between a right to disability and the accrual of a cause of action for the recovery. The whole question is made to depend upon whether the requirement is set out in the policy as a condition to the existence of the claim or to the right of its immediate payment. The refinement of language is beyond all comprehension on the part of the public who buy such contracts "ready made"—just as they purchase automobiles or other commodities.

VII.

NEGOTIABLE INSTRUMENTS

*Charles S. Tindall, Jr.**

A. Consideration

In the case of *Milstead v. Maples*[1] the Supreme Court passed upon a problem seemingly never before expressly adjudicated by it, either before or after the adoption of the Negotiable Instruments Law in 1916.[2] That problem had to do with the burden of proving consideration or want of consideration in negotiable paper cases. Since the adoption of the Negotiable Instruments Acts by the states, there has continued the same disagreement as formerly between the courts as to where the burden rests—whether upon the plaintiff or upon the defendant.[3] The majority of the courts have held that Section 24[4] and 28[5] of the Negotiable Instruments Law clearly indicate that the burden of proving want or failure of

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[27]145 Miss. 266, 110 So. 660 (1926).

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[1]180 Miss. 476, 177 So. 790 (1938).

[2]Miss. Code Ann. (1930) § 2657 *et seq.*

[3]For a compilation of authorities and a history of the problems involved see Brannan, Negotiable Instruments Law (4th ed. 1926) 211 *et seq.*

[4]Miss. Code Ann. (1930) § 2680: "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

[5]Miss. Code Ann. (1930) § 2684: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."

consideration rests upon the defendant.[6] Mississippi by the decision of the *Milstead v. Maples* case, although never before having stated its position on the point, now formally lines itself with the majority. The court itself treated the problem as so well settled as not to warrant an extended discussion or even reference to the authoritative passage from Mr. Williston's work so often quoted with approval by the writers and the courts.[7] This decision does, however, indicate the importance of the question from a practical standpoint. Under the ruling placing the burden of proving want or failure of consideration on the defendant it is insufficient, of course, for the defendant to introduce only enough evidence to create a doubt as to there being consideration for the instrument. If he does no more, and his sole defense is want of consideration or failure of consideration, the court will in all probability direct a verdict for the plaintiff on the ground that the "evidence is not sufficient to go to the jury on the defense of want of consideration."[8] The case also reiterates the familiar principle that a negotiable instrument is supported by sufficient consideration whenever there is a forbearance to assert a valid claim or a claim made in good faith which might reasonably be doubtful.[9]

B. Negotiation

In *Perry v. Consumers Lumber and Supply Co.*[10] the payee of a note indorsed it to the plaintiff, using this language: "For value received I hereby transfer to Consumers Lumber and Supply Co." When suit was brought against the payee by his indorsee the defense was interposed that this indorsement was a qualified one. In an opinion written by Judge Ethridge the court adhered to the view taken in the case of *Divelbiss v. Burns et al*[11] in which Judge Ethridge had written a dissenting opinion. The present case and the *Divelbiss* case are in accord with a long line of cases to the

[6]A clear opinion upholding the majority view is found in the leading case of Kessler v. Valerio, 102 Conn. 620, 129 Atl. 788 (1925).

[7]1 Williston, Contracts (Rev. ed. 1936) § 108: "The Negotiable Instruments Law was doubtless intended to codify the common law on the subject, and in the main unquestionably does so. There are, however, distinctions both at common law and under the statute between negotiable paper and ordinary simply written contracts with reference to consideration even as between immediate parties. In the first place 'every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value,' though when evidence is introduced tending to show that no consideration was given some courts hold that the ultimate burden of establishing its existence is upon the holder. The great weight of authority under the Negotiable Instruments Law, however, places this burden on the defendant."

[8]180 Miss. 476, 485, 177 So. 790, 792 (1938).

[9]180 Miss. 476, 484, 177 So. 790, 792 (1938).

[10]180 So. 385 (Miss. 1938).

[11]161 Miss. 724, 138 So. 346 (1931).

effect that the signer of negotiable instrument who seeks to make his indorsement qualified must do so by clear and unmistakable terms.[12] To use the words of the court in the earlier case: "When the indorser uses additional words expressive simply of assignment, which the law already attaches to his signature without the words so used, the words are in effect surplusage."[13]

C. Discharge

In *Thompson v. Gore*[14] an attempt was made by the receiver of a bank as holder of a note to recover the balance due on the note from the second indorser after having released the first indorser through a court approved composition. In the chancery decree allowing the release of the first indorser there was incorporated an order that "such release should not affect the rights of the receiver as to other makers and indorsers, nor the liability of said makers and indorsers other than" the indorser released.[15] The court held that the second indorser was discharged in spite of the express reservation of recourse to the second indorser, applying Section 120 (3)[16] of the Negotiable Instruments Act, which, as the court points out, is entirely disconnected from any provision such as is found in Section 120 (5)[17] allowing the retention of a right of recourse against parties secondarily liable by expressly so reserving it after releasing the primary debtor. While there has been extensive criticism of Section 120 (3) on other points,[18] the courts have had no difficulty with regard to this particular question, and it was properly held that the second indorser was discharged by the discharge of the prior party.

In the case of *Perry v. Consumers Lumber and Supply Co.*[19] the maker and payee were sued together and represented by the same counsel. By agreement of counsel representing both plaintiff and defendants the case was several times continued. The contention was made by the payee-indorser that he was discharged by these continuances, inasmuch as they amounted to an extension of time granted by the holder of the note without the indorser's con-

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[12]The leading cases on both sides of the argument are collected in Divelbiss v. Burns, 161 Miss. 724, 138 So. 346 (1931).

[13]161 Miss. 724, 728, 138 So. 346, 347 (1931).

[14]180 Miss. 560, 178 So. 81 (1938).

[15]180 Miss. 560, 564, 178 So. 81, 82 (1938).

[16]Miss. Code Ann. (1930) § 2776 (3): "A person secondarily liable on the instrument is discharged: . . . . (3) By the discharge of a prior party."

[17]Miss. Code Ann. (1930) § 2776 (5): "A person secondarily liable on the instrument is discharged: . . . . (5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved."

[18]See Brannan, *Op. cit. supra* note 3, at 752.

[19]180 So. 385 (Miss. 1938).

sent or without express reservation of the right of recourse to the party secondarily liable as provided in Section 120 (5)[20] of the Negotiable Instruments Law. The opinion pointed out in reply that the indorser apparently consented by making no objection though informed of the procedure about to be taken and further stated that even in the absence of knowledge on the part of the indorser he would be bound by the consent given by his attorney, since the latter was acting within the scope of his authority and representing both the indorser and the maker of the instrument.

D. Actions

In *Parrish v. Feldman*[21] the holder of a check on which payment had been stopped by the maker brought suit against the maker and the indorser in the county of the residence of the indorser. The maker asked for a change of venue to the county of his residence but the trial court refused to grant the request. The Supreme Court held that the Mississippi statute[22] providing for suit against all parties on the instrument was meant for the benefit only of parties secondarily liable as far as the first clause of the statute is concerned, but was meant for the benefit of parties primarily liable as to the last clause. The maker being primarily liable has, under the terms of the last clause of the statute, the right to have the action brought in the county of his residence. The court simpy applied the statute as previously construed.

VIII.

PLEADING, PRACTICE AND PROCEDURE

*T. C. Kimbrough**

A. Venue

That a petition for change of venue is not a nullity unless it is so void of substance that it cannot be cured by amendment is clearly set forth in *Favre v. Louisville & N. R. Co.*[1]

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[20]Miss. Code Ann. (1930) § 2776 (5).

[21]180 So. 610 (Miss. 1938).

[22]Miss. Code Ann. (1930) § 2854: "An action shall not be maintained on a bill of exchange or promissory note which has been indorsed against any one secondarily liable thereon, without joining in the action all persons residing in this state who are liable before such person on the bill or note; and the action shall be brought in the county where the party, or some one who is at first liable on said bill or note, shall reside. And the clerk shall issue duplicate writs to the several counties for the various defendants."

*Ph.B., Univ. of Miss. (1895); LL.B., Millsaps (1898); Dean, Univ. of Miss. School of Law.

[1]180 Miss. 843, 178 So. 327 (1938).

B. Jurisdiction

In the case of *Stephenson et al v. New Orleans & N. E. R. Co. et al,*[2] the court held that an order or judgment of any board or judicial tribunal which appears on its face to be absolutely void for want of jurisdiction of the subject matter may be attacked collaterally and disregarded as a nullity.

Chancery court does not have jurisdiction of the person of defendants unless such defendants be before the court upon proper process. Therefore, where three non-resident defendants are sued in one county, and they are found and served with process in another county, the court does not by virtue of Section 495, Mississippi Code of 1930, have jurisdiction of the persons of the defendants, and the suit is properly dismissed for lack of jurisdiction. Under our system of pleading in Mississippi, it is immaterial that a demurrer to a bill was filed along with plea to jurisdiction. As there was no statute authorizing transfer of the cause to another jurisdiction, the court properly dismissed the bill upon motion, and such dismissal was not passing upon the merits of the case. *Brashier v. J. C. O'Connor & Sons.*[3]

C. Process

In the case of *State v. McPhail,*[4] evidence secured by militiaman under process issued by justice of peace and returned by militiaman was ruled out as evidence illegally obtained. The supreme court held that the governor is an executive officer in every county of the state; and he may set the enforcement machinery in motion and thereby determine to whom the civil process may be directed for execution, when that has become proper on account of failure, neglect, or inability of the local executive officers to act. In the same case the court restates the old rule that the writ of injunction or mandamus or other judicial remedial writ will not run against the governor, or any member of the legislature in his official capacity.

D. Appearances

The Alabama Power Company, a non-resident corporation, in a garnishment proceeding against them, appeared by motion specially and solely for the purpose of objecting to the jurisdiction of the court to proceed in the matter as against them. Appellees contend that by appearing, the Alabama Power Company submitted itself to the jurisdiction of the court. The supreme court held

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[2]180 Miss. 147, 177 So. 509 (1937).
[3]180 So. 67 (Miss. 1938).
[4]180 So. 387 (Miss. 1938).

that when the company appeared therein it had the same rights that any other litigant would have, one of which is, to object to the jurisdiction of the court, and if the court was without jurisdiction, to obtain dismissal of the suit.[5]

E. Pleading

As a general rule a party is estopped from taking a position which is inconsistent with one previously assumed in the course of the same action or proceeding, the court announces in *Mississippi State Highway Commission v. West et al,*[6] but he is bound by allegations or admissions in his own pleadings and by admissions or agreements on the facts. This rule does not obtain as to admissions concerning the law.

In the case of *Bates v. City of McComb et al,*[7] the court held it is a well established rule that a general averment of negligence in doing or omitting a particular act is good against a general demurrer for want of sufficient facts, or a motion in arrest of judgment, unless the averment is too general to give defendants reasonable notice of the negligence charged.

The court further holds that where the language of a declaration, though showing a cause of action in a general way, is vague, uncertain, indefinite and ambiguous, the remedy as to uncertainty and the like is found in Sections 554 and 555, Mississippi Code of 1930. The remedy provided in these Sections is not a demurrer, but a motion to compel the pleader to make more certain his declaration. Special demurrer was formerly used in such cases but it was abolished by Section 553 of the Mississippi Code of 1930.

The refusal of a request for a non-suit made prior to the court's final ruling on a defendant's motion for a peremptory instruction, although the court had already indicated that it would grant the motion for a peremptory instruction, constitutes reversible error, the court says in *Hill et al v. Johnson-Cone Brick Co. et al.*[8] The court in this case reviews all former adjudications on questions arising out of motions for non-suit. The language used by the court in this case might be construed by inference that there are possible conflicting holdings by the court on the question involved in the case.[9]

A suit was brought in the circuit court of Shelby County, Tennessee, for damages for an alleged tortious injury received in

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[5]Alabama Power Co. et al v. Jackson, 179 So. 571 (Miss. 1938).
[6]179 So. 279 (Miss. 1938).
[7]179 So. 737 (Miss. 1938).
[8]180 Miss. 305, 177 So. 520 (1937).
[9]Citing Miss. Code Ann. (1930) § 594.

the state of Tennessee by plaintiff through the negligence of the defendant's agents and managers. In this trial, at the conclusion of the plaintiff's proof, the court was in the act of granting to the defendant a motion for a directed verdict, but before the motion could be properly entered, the plaintiff took a voluntary non-suit. Suit was then filed by plaintiff in the chancery court of Prentiss County, Mississippi, when defendant interposed, in the form of a plea, what had taken place in the Tennessee court. Judge Griffith on appeal stated that the Tennessee court at the conclusion of the plaintiff's testimony as shown by the record before him, "was in the act of granting to the defendant a motion for a directed verdict," (this quoted from record coming from Tennessee court), and that before the formalities of the entry could be accomplished, the plaintiff took a non-suit.

Judge Griffith then says the necessary import of this language is that the court had announced its determination or conclusion, "or signified its assent that a directed verdict was proper and should be granted; otherwise it could not have been in the act of so granting." This means, according to Judge Griffith, that the Tennessee court, after hearing the plaintiff's testimony and responding to defendant's motion for a directed verdict, had rendered a final judgment to the effect that plaintiff's testimony under the law of Tennessee showed no liability on the part of the defendant before the motion for non-suit was presented to the court. If no liability existed under Tennessee law, the *lex loci delicti*, then the Mississippi courts will be governed by the Tennessee court's holding and dismiss the case.[10]

In *Stephenson v. Louisiana Oil Refining Co.*,[11] where a defendant, by a sworn plea, expressly denies that he wrote, signed, or authorized a letter to the plaintiff acknowledging the correctness of a written account sued on, and there is no evidence to the contrary, the denial must be accepted as true. The filing of a sworn plea at the trial is within the trial court's discretion. The court cites Sections 2299 and 2318 of Mississippi Code of 1930.

In the case of *Wood et al v. Peerey*,[12] it was held that the declaration is the beginning of a suit and will stop the running of the Statute of Limitations even though the clerk fails to issue summons until expiration of period.[13] The appellee, at the time he filed the declaration with the clerk, requested him to issue the summons at once. In doing this, he did all he was required by law to

[10]Welch v. Kroger Grocery Co., 180 Miss. 89, 177 So. 520 (1937).
[11]180 Miss. 410, 177 So. 912 (1938).
[12]179 Miss. 727, 176 So. 721 (1937).
[13]Construing MISS. CODE ANN. (1930) § 520.

do in order to stop the running of the Statute of Limitations. His rights were not defeated by the dereliction of duty on the part of the clerk. The same rule applies with equal force in Chancery.[14]

In the case of *Curry v. Credit*,[15] Section 567 of the Mississippi Code of 1930 was construed, and the court held that while the statute on amendments is liberal, an entirely different plaintiff will not, in a new trial of a case, be allowed to substitute himself as plaintiff for the party who first instituted the suit in his own right.

The court held in the case of *Randall et al. v. Gunter*,[16] that so long as there was a plea on file presenting a valid defense which had not been disposed of, it was erroneous to give a judgment by default.

In the case of *Stricklin v. Harvey*,[17] it was held that when a party seeks a peremptory instruction, everything which the evidence establishes directly or by reasonable inference must be considered as proved against the party asking for the peremptory instruction.

F. Appeal and Error

The decision and judgment of the trial court is presumed to be correct on appeal, and where material evidence which was introduced in the lower court was not produced in the supreme court in such manner that it could clearly tell what the evidence was, the supreme court will assume that it was of such a character as to sustain the decision and judgment of the lower court.[18]

The court sustained a demurrer to a replication, filed to a special plea, in part and overruled it in part, in *Covington, et al v. Ross*,[19] contrary to the rule in numerous prior cases.[20] In the cases cited the demurrer was to a declaration, but the rule announced should apply in all instances where a demurrer is interposed to an affirmative pleading.

Under Section 13, Mississippi Code of 1930, appeals can be had only from *final* judgments. The judgment here was not final but interlocutory. Hence, the supreme court is without jurisdiction and must dismiss the case.

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[14]Swalm v. Sauls, 141 Miss. 515, 106 So. 775 (1926).
[15]179 Miss. 692, 176 So. 723 (1937).
[16]179 So. 362 (Miss. 1938).
[17]179 So. 345 (Miss. 1938).
[18]Favre v. Louisville & N. R. Co., 180 Miss. 843, 178 So. 327 (1938).
[19]180 Miss. 789, 178 So. 474 (1938).
[20]Canton Cotton Warehouse v. Potts, 68 Miss. 637, 10 So. 59 (1891); Washington v. Soria, 73 Miss. 665, 19 So. 485 (1896); Cummings v. Dougherty, 73 Miss. 405, 18 So. 657 (1895).

In the case of *Crosby Lumber & Mfg. Co. et al v. Durham*,[21] where appellee was bringing action for death of decedent in logging operations, complaint was made of a statement by the appellee's counsel to the jury when arguing the case before it. It appeared from a special bill of exceptions that a cripple, Elwyn Carter, who walked with the aid of crutches, was in the courtroom in full view of the jury, and that counsel for appellee in the course of his argument said "As a result of this logging operation, Elwyn Carter is a cripple today." The court sustained an objection to counsel's remarks about Carter and told the jury to disregard them. Appellant then moved that the case be withdrawn from the jury and a mistrial entered, which motion was overruled. The court held no error was committed.

In the case of *Roberts v. International Harvester Co.*,[22] appellant made, in the supreme court, a motion for a new trial on the ground of misconduct of his trial attorney, which misconduct was such as to render impossible the proper presentation of the appellant's case before the trial court. The supreme court is a court of appeals and without such original jurisdiction as appellant has sought to invoke by his motion. Such motion must be first made in the trial court and the formal rulings of the trial judge had thereon.

IX.
PROPERTY, INCLUDING WILLS

*W. G. Roberds**

A. Real Property

(1) Mortgages

(a) In General

In *Gann et al v. Jackaw Lumber Company*[1] the lumber company owed an assigned note and trust deed securing same on certain timber lands. Lumber company sued Gann in the circuit court on the note, the cause being removed on motion of Gann to the chancery court. Gann then set up a contract with the lumber company, under which contract Gann was to cut the timber on the mortgaged premises and, as construed by the Supreme Court, which timber the lumber company was to purchase at certain prices, applying $4 per thousand feet to the mortgage debt. Gann

[21] 179 So. 285 (Miss. 1938).
[22] 180 So. 747 (Miss. 1938).
*B.S., Miss. State College (1907); LL.B., Univ. of Miss. (1910); Professor of Law, Univ. of Miss. School of Law.
[1] 179 Miss. 799, 177 So. 4 (1937).

claimed to have cut some 75,000 feet which the lumber company would not take. Because of this failure the lumber deteriorated and Gann, defendant below, was damaged and claimed as a set off against the mortgage debt the amount of this damage. The lower court construed this agreement to be one in which the lumber company agreed to act as selling agent of Gann, but the Supreme Court construed it to be an agreement on part of the lumber company to purchase the lumber and the cause was reversed and remanded.

The case of *Chandler et al v. Bank of Brooksville*[2] was an action of ejectment by the bank as the owner of lands purchased by it under foreclosure sale of a trust deed, where the trustee was substituted without the seal of the bank being attached and where the trustee's deed recited, as to the length of time the notice of sale was published, that it was "for the length of time as required by law." Defendant contended the sale was void for the foregoing reasons. The Supreme Court held: (1) that the appointment of the trustee did not have to be under the seal of the bank and (2) that the recital in the trustee's deed was *prima facie* compliance with the law as to publication in the absence of proof showing non-compliance.

In *Taylor v. Phillips*,[3] *C* bank held a first trust deed and *F* bank a second trust deed against the lands of *P*. *G* advanced money to pay off the balance of *C* bank's debt, taking a trust deed from *P* and wife to secure the money so advanced, but there was no assignment to *G* of the existing trust deed to *C* bank. At the same time the trust deed to *F* bank was renewed by *P* and wife, the existing trust deed apparently not being satisfied. But *F* bank agreed orally with *G* that *G's* trust deed should first be placed of record and would be prior to that of *F* bank, but, in fact, *F* bank's trust deed was first placed of record. There was no express recital in the instruments as to which should have priority. *F* bank went into the hands of a receiver and the receiver, after maturity of *P's* debt, sold and assigned the *P's* note and trust deed to *T*. *T* contends that in his hands as assignee the *F* bank trust deed is prior to that of *G*. The court held that oral proof of the verbal agreement between *G* and *F* bank, that *G's* trust deed should be prior, was competent; that *T*, being a purchaser of the paper after maturity, was not an innocent purchaser without notice; and that, therefore, *G's* trust deed was prior, and this result was not violative of the Statute of Frauds.

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[2]178 So. 797 (Miss. 1938).
[3]181 So. 855 (Miss. 1938).

(b) Foreclosure

Clinton et al v. First National Bank of St. Louis[4] was an action by the bank, as corporate trustee, and another to foreclose a trust deed securing bonds, wherein a sale was directed by a consent decree. This decree adjudicated certain rights beneficial to all parties. Objections to confirmation of the sale of the property were made and a decree was entered confirming the sale and directing certain payments to be made from the proceeds. The court held the consent decree as final and would not disturb the sale because of the price of $84,000, although some witnesses gave as their opinion that the property was worth $200,000, since it was shown that the parties having an opportunity to bid had instructed their bidders a number of times not to bid over $84,000, and the testimony as to value being in conflict.

In *Home Insurance Company v. Citizen's Bank*,[5] the bank, as mortgagee of a house, was beneficiary in a fire insurance policy issued by the insurance company. The house burned and the insurance company purchased from the bank its notes and mortgage, both being endorsed without recourse. The wife had not joined in the mortgage and it developed that the mortgaged premises constituted the homestead of the mortgagor and his wife, contrary to the express provisions contained in the mortgage. The court, at the instance of mortgagor and wife, enjoined the foreclosure of the trust deed. Thereupon the insurance company brought this action against the bank on the theory that by the endorsement the bank "thereby guaranteed the validity of the instrument", and was, therefore, liable to the endorsee for the full amount paid by the endorsee for the note and trust deed. The court held that before and after the enactment of the Negotiable Instruments Law in Mississippi an assignee of a note and mortgage endorsed without recourse has no right of action against an indorser for recission or otherwise, because the mortgage security turned out to be without value, by reason of defect in the title or absence of title of the mortgagor in the mortgaged premises.

In *Hardin v. Grenada Bank*[6] the interesting pronouncement was made by the court that where a debtor, before the sale under trust deed, made a claim of usury as existing in the secured debt, to the extent that the interest should be forfeited and that, with the interest forfeited, the payments which had been made would aggregate at least the amount of the principal debt, the debtor having given notice of this before the sale both to the trustee in the

[4]179 Miss. 492, 176 So. 250 (1937).
[5]178 So. 589 (Miss. 1938).
[6]180 So. 805 (Miss. 1938).

trust deed and the purchaser at the sale under the foreclosure, the debtor is entitled to have the sale set aside and the title revested in himself, where investigation would have disclosed that the claims of the debtor were true.

(c) Moratorium

In *Atlantic Life Insurance Company v. Klotz et al*[7] the court reversed and remanded the cause for the following reasons: (1) no proof was made that the debtor, who had obtained an injunction against foreclosure, had exhausted all federal agencies in an effort to refinance his indebtedness; and (2) no notice of the hearing of the application for injunction had been given the mortgagee.

(2) Adverse Possession

The writer is confident many of the attorneys of the state are under the impression that in order for one to obtain title by adverse possession there must be color of title. This is true as to constructive possession but not as to actual possession. The court re-announced the rule in *Evans v. Shows*,[8] using this language: "while color of title coupled with actual possession of part of the land would constitute constructive possession of the whole it is equally true that without color of title by parol gift, deed, or other writing, adverse possession gives title only to the land actually and continuously used, cultivated or occupied." This is in accordance with the rule laid down in *Dedeaux v. Bayour Delsie Lumber Company*.[9] In the *Evans* case the court again stated that for one to ever obtain title by adverse possession the claimant must occupy by virtue of claim of right.

Following the *Evans* case the court in *Bullock v. Greer*[10] announced the well recognized rule that "a person in possession of part of a tract of land, by having possession of that part, will be deemed to be in possession of all the lands called for in the deed," but that in order to obtain title to lands outside of the calls of the deed there must be actual, adverse, continuous, exclusive possession thereof, under claim of right.

Illustrating that possession must be by virtue of claim of right, the court, in *Barron v. Federal Land Bank*,[11] held that permissive possession, though long continued, does not confer title on the party in possession. It was also held that one having a deed to 5 acres of land which he had not recorded and who knew that an-

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[7]181 So. 519 (Miss. 1938).
[8]180 Miss. 518, 177 So. 786 (1938).
[9]112 Miss. 325, 73 So. 53 (1916).
[10]179 So. 264 (Miss. 1938).
[11]180 So. 75 (Miss. 1938).

other person had erroneously included that 5 acres in a deed of trust to the land bank, might be estopped to assert his title to the 5 acres where he did nothing to correct the error.

(3) Eminent Domain

In *Byrd v. Board of Supervisors*,[12] the court announced that if abutting property owners are damaged by the closing of a public road, such owners have a remedy for damages under the doctrine of *Berry v. Board of Supervisors*.[13] And although the question here was whether a road should be closed, it was held that in eminent domain proceedings neither the state nor any of its subdivisions need tender in advance the amount of the damage, but that the pledging of the public faith and credit "to a reasonably prompt ascertainment of payment and there is adequate provision for enforcing the pledge," is sufficient.

It is difficult to reconcile this holding with Section 17 of the Mississippi Constitution requiring that before private property can "be taken or damaged" for public use, due compensation must be "first made to the owner." Some difference may be perceived in damage resulting from the closing of a public road and condemnation through eminent domain, but the court in this case did not undertake to draw a distinction.

It was in this case the court, responding to critical statements in the suggestion of error, used this language: "The office of a suggestion of error is to furnish light, not heat; and there ought to be no difference of opinion that expressions such as above mentioned, are improper, whether in or out of court."

In *Thompson v. City of Philadelphia*,[14] Thompson and others sued the city of Philadelphia for damage resulting to pastures and farm lands caused by the city sewerage being discharged into an open ditch running thru the lands of the plaintiffs, and also for disagreeable odors caused thereby. There was a judgment below for the city. The court instructed the jury that it should find for the city unless the jury should find from a preponderance of the evidence that the damage was the result of "the negligent construction and maintenance" of the sewerage system. The case was reversed and remanded because of this instruction, the court saying "the liability under section 17 of the constitution is not dependent on negligence but on the taking or damaging." The plaintiffs inherited the lands. The court held they could re-

[12]179 Miss. 880, 176 So. 386 (1937).
[13]156 Miss. 629, 126 So. 405 (1929).
[14]180 Miss. 190, 177 So. 39 (1937).

cover nothing for damages occurring before death of their ancestor; they inherited the land but not the right of action for former trespasses.

In *Henritzy v. Harrison County*,[15] the plaintiff, as owner of the land, placed a concrete structure across the land over which the county claimed an easement for purpose of constructing a sea wall along the gulf coast to protect the highway and adjacent property from damage and destruction caused by tropical storms and the waters of the gulf. The county filed a proceedings to enjoin the erection of the concrete structure. Chapter 319, Laws of 1924, confers the right and provides the procedure for the county to acquire the easement. The court held: (1) that the provision of the statute for the landowner to claim compensation within a named time does not violate the constitution forbidding the taking of property without compensation being first paid; (2) nor is it rendered unconstitutional because, in the first instance, the damages are not fixed by a jury, since the statute provides for a review in the circuit court; (3) that failure to make the claim within 30 days after publication of notice to do so bars the claim under the above chapter; and (4) present owner cannot sue for damage to prior owner unless the present owner has acquired by assignment, either by contract or law, the right of the original owner to sue for damages.

Those who have gone through the ordeal of trying to collect money from the state or its subdivisions will not receive with joy the announcement in this case and the *Byrd* case, *supra*, that the state nor its subdivisions need first tender compensation before taking private property for public use.

A number of condemnation proceedings came before the Supreme Court during the past term, involving mainly the rule for ascertaining the amount of the damage and the competency of testimony as to the elements of damage.

One was *State Highway Commission v. Randle*.[16] This was a road right of way condemnation across lands of defendant, Randle. The amount of land taken was 35 acres and the jury assessed the value at $2,734.66. Testimony in lower court was admitted that the property was of historical value; that the structures had been erected by slaves; that the construction of the public highway had caused the squirrels, as well as peace and quiet, to depart; that the owner was financially unable to construct a fence along side the highway. The Supreme Court indicated this

[15]180 Miss. 675, 178 So. 322 (1938).
[16]180 Miss. 834, 178 So. 486 (1938).

testimony was irrelevant and ordered reversal and remanding of the case unless landowner would enter a *remittitur* of $1300.

The next case was that of *Mississippi State Highway Commission v. West et al*,[17] in which it was held that the condemnor must determine at his peril the names of the owners and persons having interests in or liens upon the premises sought to be condemned.

In *Mississippi State Highway Commission v. Williamson et al*,[18] the rule announced for determining damages "was the fair market value of the land before taking and the fair market value of what was left after the taking."

In *Mississippi State Highway Commission v. Yellow Creek Drainage District*[19] the Commission undertook to construct a bridge across Yellow Creek, placing piers in the bottom of the canal, with braces across, which would have materially affected the flow of the water in the canal. The court held that in the absence of statute forbidding it, property devoted to one public use may be taken for another public use where the taking will not materially impair or interfere with, or is not inconsistent with, the existing use and not detrimental to the public interest.

(4) Homestead

The holding in the case of *Clark et al v. Edwards*,[20] the writer believes, is contrary to the opinion heretofore held by a large number of the members of the bar of the state. The court held that the $3000 value applies to the value of the homestead and not to the interest of the owner therein. One Edwards had a homstead of 120 acres, on which, during his life time, he had executed a trust deed to secure $3,564.74. After his death this deed of trust was foreclosed and the land brought at the sale for $5,500, the excess above the debt being paid to Edward's executor. His creditors claimed the excess. The lower court held the excess exempt from his debts. The Supreme Court held it was not exempt, the court

[17]179 So. 279 (Miss. 1938).

[18]179 So. 736 (Miss. 1938). See also Mississippi State Highway Commission v. Day, 180 So. 794 (Miss. 1938) which defined the measure of damage as being "the difference between the market value of the entire tract before and after taking."

[19]180 So. 749 (Miss. 1938). In Mississippi State Highway Commission v. Hudgins, 181 So. 717 (Miss. 1938), it was held that where it was not possible to determine the value of the land and buildings taken by the commission without taking into consideration the fact that they were piped to an available water supply, yet the landowner could not be awarded additional damages based on the value of the spring furnishing the water supply, even though the spring might not be of any further value to the landowner.

[20]180 Miss. 97, 177 So. 361 (1938). As a result of this decision, Miss. Laws 1938 c. 125 provided that in determining the value, existing incumbrances, including taxes and other liens, shall first be deducted. Rights and obligations prior to this, however, would yet be involved.

saying "Neither sections 1765, 1771, nor 1772, Code of 1930, which two latter provide for the sale of a homestead for debt where its value exceeds $3,000, provides that in ascertaining this value existing encumbrances on the land must be deducted from the land's value, nor has any other statute so providing been called to our attention."

In *Bruce Company v. Spears*,[21] the defendant, Spears, executed to Bruce Company a deed to the timber on 424 acres of land. Bruce had procured a party to cut the timber when he received two written notices advising that Mrs. Spears had not signed the deed and that the lands constituted their homestead. Bruce undertook to enjoin Spears and his wife from interfering with the cutting of the timber, or to recover the value thereof from Spears. The defendants, Spears and wife, filed a cross-bill asking for the value of the timber cut and for statutory penalty for cutting trees. Lower court awarded a personal decree against Spears for $375 as the value of the timber not obtained by Bruce, and awarded to Spears and wife $421.96, the difference between the $375 allowed Bruce, and $47.50, the value of the timber cut, and $735 statutory penalty for cutting the trees. The Supreme Court reversed and remanded the cause on the ground "Neither Spears nor the Court which tried the issue between these parties had the right to arbitrarily fix the allotment of the exempt homestead"; that this should have been done by appointment by the court of commissioners to make the allotment in accordance with sections 1771 *et seq*, Mississippi Code of 1930.

(5) Landlord and Tenant

In *Tennessee Land Bank v. Bank of Greenwood et al*,[22] the main question was whether the Land Bank, as landlord, had waived its lien upon the cotton grown on the rented premises so as to enable the tenant to store the cotton in a warehouse, take receipts in his own name and negotiate these receipts in obtaining a production crop loan through the Bank of Greenwood. The lower court held there was a waiver. On this question the Supreme Court reversed the lower court, holding: (1) the evidence did not establish that the landlord, by its conduct, had impliedly permitted the tenant to store cotton in the compress, or take warehouse receipts in tenant's name and dispose of the receipts; (2) that the removal of the agricultural products from the leased premises does not interfere with the right of the landlord to enforce his lien upon such products; (3) that any person, with or without notice, who

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[21]181 So. 333 (Miss. 1938).

[22]179 Miss. 534, 172 So. 323 (1937). See also Johnson v. Langston Johnson, 179 Miss. 622, 176 So. 531 (1937).

purchases such products on which the lien exists is liable to the landlord for the value of the products; (4) that to effect a waiver of the landlord's lien the evidence must preponderate that the landlord either (a) affirmatively agreed to permit, or (b) by his conduct and course of dealing did permit, the tenant to deal with such products as though they had been freed of the lien; and (5) *bona fide* purchasers of warehouse receipts do not acquire title, under the Warehouse Receipt Act, when he purchases from a mere trespasser.

In *McDonald v. Wilmut Gas & Oil Company*,[23] "Ole McDonald" didn't have a horse dut did have an ox, and sued not for damages because his ox was gored but because he fell into an open ditch and was drowned. The landowner deeded the Gas Company a right of way 16 feet in width to lay a gas pipe line, with the stipulation that the pipe line should be buried below plow depth so as not to interfere with the cultivation of the land. Beyond the cultivatable land was a morass, the ground being so soft and boggy as to be incapable of bearing the weight of person or animal on foot. In this area the gas company laid the pipe in a ditch and did not cover the ditch, it being deep in water both summer and winter. Neighbors, including the plaintiff, to obtain the right of pasturage in this area, constructed a fence around it, and as many as 75 head of cattle were pastured there at the same time. Plaintiff knew of the open ditch and the uncovered pipe line therein. The court held gas company not liable. Court laid down these rules as between landlord and tenant: (a) As to tenant, he takes the premises as finds them, and, in the absence of concealment or fraud by lessor of some defect or danger in the premises known to him and unknown to tenant, the rule of *caveat emptor* applies; (b) As to a licensee, the licensor is not under duty to maintain premises in safe condition, but is under duty to disclose to licensee the risks which he takes if he accepts the premises; (c) If one is a licensee for valuable consideration, he is somewhere between a tenant and a gratuitous licensee, with rights no higher than a tenant nor lower than a gratuitous licensee.

In *Evans v. Hill*,[24] plaintiff sued Evans for damages resulting from injury to her foot, caused by the falling thereon of a window frame from a window in the second story of a building owned by defendants, as she walked along one of the public streets in the city of Aberdeen. Verdict and judgment below was for the plaintiff for $1000. Reversed and judgment for landowner in Supreme Court.

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[23]180 Miss. 350, 176 So. 395 (1937).
[24]181 So. 847 (Miss. 1938).

The window appeared to be in good condition, but in reality, was partly held by rotten pegs. To detect the condition of the pegs it would have been necessary to push them out with a pencil or some such instrument. The landlord the previous year had engaged a carpenter to examine and repair the building. He had placed cleats under the window. These had been removed by some unknown person. The carpenter did not notice the rotten pegs. The court held: (1) that in absence of contract so to do, the lessor is not charged with the duty of keeping the building in repair during the period of the lease; this duty is on the lessee; that (2) lessors knew nothing of this defect and it was not of such nature as, under the disclosed circumstances, the lessors were charged with notice; and (3) that the doctrine of *res ipsa loquitur* did not here apply.

In *Coman v. Jourdan*,[25] an action of unlawful entry and detainer was dismissed because the evidence did not show the named defendant was in possession of the premises when the action was begun, or that the right of action accrued within 12 months before being brought, as required by Sec. 3456, Mississippi Code of 1930.

B. Wills

In the case of *Austin v. Patrick*,[26] the testratrix sent for one Peter Crossley, and, on December 24, 1936, presented the alleged will to him and told him that it was her will; that she had signed it and wanted him to sign it as a witness. He then signed it as a witness in her presence. On or about February 15th, 1937, testatrix sent for one Furlough and told him that the instrument was her will and requested him to sign it as a witness. He signed it in her presence but not in the presence of the other witness, and was not present when Crossley signed it in December. The court held that this was a compliance, as to manner of execution, with the requirements of Section 1602 of the Mississippi Code of 1930.

This follows the case of *Miller v. Miller*[27] holding that "it is enough if he (testator) shall produce the will, declare it to be his will, and state that the signature appended to the will is his, and that he wrote it."

Two novel contentions were made in *Thompson v. Carter's Estate*.[28] Carter, at time of his death, was a joint maker of a note to People's Bank on which there was a balance of $305.55

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[25]180 So. 792 (Miss. 1938).
[26]179 Miss. 718, 176 So. 714 (1937).
[27]96 Miss. 526, 51 So. 210 (1910).
[28]180 Miss. 104, 177 So. 356 (1938).

owing. 30 days after Carter's death the receiver of this bank presented a petition to the chancery court asking that the sheriff of the county be appointed administrator of his estate. His heirs contested the petition on the ground that when the bank became insolvent and a receiver was appointed, Carter had on deposit with it more than enough to pay the note, and that the bank should have charged the deposit against the note. The heirs asked for a decree over against the receiver for the excess of the deposit over the amount of the note. The court held: (1) the petition for letters should have been granted and (2) the decree over could not be rendered in this proceeding. The novelty is that the bank had not already charged off the deposit, but not having done so, there is the further novelty that the heirs would insist that it be done.

In *Gholson et al v. Peters et al*[29] the issue was mental capacity. The jury found for contestants, who were the two daughters of testatrix, the beneficiary being a child of one of these daughters. The main ground for the contest was the alleged unnatural hatred which the testatrix had for the two daughters. The court, in reversing the verdict and judgment and sustaining the will, found that the testatrix at the time of executing the will exhibited no monomania and held (1) that a person afflicted with general insanity or monomania may make a valid will during lucid intervals, and (2) that unfounded prejudice or even hatred towards a near relative will not, of itself, destroy testamentary capacity unless the sentiments harbored by him amount to an insane delusion or to monomania on the subject, and that such be the dominating factor in the testamentary act and at the time thereof. The court further found that "here, not the hatred or dislike of the daughters was the dominant agency, but the great love which she bore to her granddaughter, the object—and a natural one—around which her whole life had become centered."

In *Howell v. Ott*[30] the only holdings of general interest were (1) that an executor, holding security for a debt due him by the testator, could rely upon his security and need not probate his debt against the estate, just as any one else might do, and (2) that the allowance of solicitor's fees by the chancellor is entitled to great weight.

Brown et al v. Sperry,[31] also involved construction of a will. The principal pronouncement of the law was: "Where a testator devised corporate stock in trust, the income therefrom to be paid

[29]180 Miss. 256, 176 So. 605 (1937).
[30]180 So. 52 (Miss. 1938).
[31]181 So. 734 (Miss. 1938).

to one for life, and on his death the stock to be delivered to and become the property of another, dividends paid on this stock after the testator's death out of money earned by the corporation after his death are income payable to the life tenant, but dividends paid thereon, as here, after the testator's death wholly out of earnings of the corporation prior to the testator's death which had accumulated in the form of a surplus, are part of the corpus of the trust estate and not income payable to the life tenant."

X.
REMEDIES

*Leslie Darden**

A. Prohibition

The Supreme Court has had before it during the period under consideration in this article several cases involving the writ of prohibition where interesting factual situations were presented, and where new applications of old principles were announced.

In *Blount v. Kerley*,[1] the Board of Supervisors of Jefferson Davis County ordered an election to determine whether or not the electors of the county favored the sale of beer. Notice of the election was first given June 14, 1934, and the election was held July 10, 1934, and was carried against the sale of beer in the county. An order was entered by the Board of Supervisors adjudging the election legally held and no appeal or *certiorari* was taken from the order of the Board. After the decision of the Simpson County case,[2] the plaintiff tendered the tax collector a sum necessary to pay for a privilege license and the plaintiff proceeded to sell beer without the license. Prosecution was instituted in the court of the defendant, a justice of the peace, against the plaintiff for the unlawful sale of beer and the plaintiff applied to the circuit court for a writ of prohibition, which was denied, whereupon the plaintiff appealed.

The court held that by a writ of prohibition an attack cannot be made upon irregularities in a judicial proceeding before the Board of Supervisors, and that the justice of the peace having jurisdiction of all misdeameanors, the prohibition was properly denied.

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*LL.B., Univ. of Miss. (1933); Member Mississippi and Union County Bars; New Albany, Miss.

[1]180 Miss. 863, 178 So. 591 (1938).

[2]Simpson County v. Burkett, 178 Miss. 44, 172 So. 329 (1937).

The court went further and held that any violation of an ordinance during the period of prohibition could be prosecuted after a final judgment upholding the validity of the ordinance, and by this opinion presaged its definite holding in the *Earley* case,[3] to the effect that a violation occurring during the pendency of a cause on *certiorari* might be prosecuted after a decision by the higher court.

In the case of *City of Greenwood v. Humphrey, Inc.*,[4] the plaintiff applied to the Circuit Court of LeFlore County for a writ of prohibition against the city of Greenwood and against the judge of the county court of that county to prevent the county court from taking jurisdiction of and trying a condemnation proceeding instituted by the city against the plaintiff, which had been removed to the federal court for the northern district of Mississippi, and which had been remanded by a void order of the federal judge of the southern district of Mississippi.

Asserting that Section 1510 of the Mississippi Code of 1930 was not intended to limit the use of the writ of prohibition in eminent domain cases to the trial of the questions specifically mentioned in the statute,[5] the court held that the statute merely extended the scope of the writ. The federal court still having jurisdiction of the case, it was held that the writ was properly issued, because the county court had no jurisdiction.

B. Mandamus

Holding that the reduction of their demand to a judgment was not a necessary condition precedent to bringing a suit for mandamus for the payment of drainage bonds by the bondholders against the drainage district in the case of *Teoc Sub-Drainage District v. Halliwell*,[6] the court followed the case of *Johnson v. Bruce*[7]. In *American Book Company v. Vandiver*,[8] the court held that mandamus by a publishing company would not lie to enforce a contract made under the provisions of Article 30 of Chapter 163 of the Code of 1930 for the adoption of the publishers books for school use where the governor had not approved the bond provided for in that section. The action of the governor in approving or disapproving the bond was held by the court to be judicial, not

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[3]Earley v. Board of Supervisors, 181 So. 132 (Miss. 1938).

[4]179 So. 862 (Miss. 1938).

[5](1) Whether or not the eminent domain proceeding is entitled to exercise the right of eminent domain and, (2) whether or not there is a public necessity for the taking of the particular property.

[6]180 Miss. 720, 178 So. 84 (1938).

[7]177 Miss. 581, 171 So. 685 (1937).

[8]178 So. 598 (Miss. 1938).

subject to review by writ of mandamus. In this case, the court drew an analogy between the bond required under Section 6803, Code 1930, and the official bonds of elected officers and applied the rule announced in the case of *Swan v. Gray*.[9]

Applying the general rule that mandamus will not lie to compel officers to exercise their discretion in any particular way, the court in *Andrews v. McKee et al*[10] refused to order the issuance of the writ to compel the drainage district commissioners to levy an additional assessment and tax on the lands in the district for the payment of bonds of an additional bond issue exceeding the total assessed benefits of the lands of the district, saying that the writ would lie to force the commissioners to meet and consider the levy of the additional assessment and tax, but not to force them to exercise their discretion in any particular manner after they had met and considered the question.

C. Ejectment

Pretermitting the question as to whether or not the inadequacy of the sale price of property at a mortgage foreclosure could be raised in a court of law, the court in *Chandler v. Bank of Brooksville*,[11] held that a remedy by way of ejectment action in the circuit court was open to a purchaser at a foreclosure sale to gain possession of land held by successors in title to the mortgagor, the contention of the defendants being that the action was cognizable only in a court of equity.

D. Garnishment

A case of first impression on the question of whether or not it is necessary under the chancery attachment law[12] for the garnishee to be a resident of Mississippi, is the case of *Alabama Power Company, et al v. Jackson*.[13] This is an action which was brought for the recovery of damages for personal injuries by way of chancery attachment, against Alabama Power Company, a Maine Corporation not engaged in business in Mississippi, nor having any property therein. The garnishees served with process were two individuals, who were residents of Alabama, and against Mississippi Power Co., a Maine Corporation doing business in Mississippi and having an agent for the service of process in Harrison

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[9]44 Miss. 393 (1870). See also Shotwell v. Covington, 69 Miss. 785, 12 So. 260 (1892) and Andrews v. Covington, 69 Miss. 740, 13 So. 853 (1892).
[10]179 So. 858 (Miss. 1938).
[11]178 So. 797 (Miss. 1938).
[12]Miss. Code Ann. (1930) art. 2, c. 7.
[13]179 So. 571 (Miss. 1938).

County. Process was had upon the individuals while temporarily in Prentiss County where the suit had been filed.

It was held by the court that the words "persons in this state" as used in Section 173, referring to the persons who might be made parties garnishee, necessarily meant persons who were residents in this state, and that the individual garnishees who were residents of Alabama and who were served while temporarily in Mississippi could not be held to be "persons in this state" within the meaning of those words as used in the statute.[14]

E. Injunctions

In grafting an exception to the general rule that only the defendant may abate the second of two suits filed against him for the same cause of action, the court permitted the State Tax Collector injunctive relief to prohibit a sheriff from prosecuting suits for the collection of taxes against parties already sued for the same taxes by the State Tax Collector.[15] The basis for this exception and for the granting of injunctive relief as stated by the court was to conserve the time of public officers and the expenditure of public funds.

In *Greenwood Lodge No. 18 IOOF v. Hyman*,[16] the court denied injunctive relief upon the familiar ground that where no pecuniary damage is shown to the plaintiff and the only basis for relief is a sentimental or capricious whim, equity will not intervene.

Gamble v. Wilson,[17] provided for a remedy by injunction to enforce a contract not to engage in a particular business. In this case the complainants and the defendants had entered into a contract providing for the employment of the defendants in the com-

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[14]Of interest is the holding of the instant case, particularly when compared with Clark v. L. & N. R. R. Co., 158 Miss. 287, 130 So. 302 (1930). The court in that case as in Central Western Development Co. v. Lewis, 142 Miss. 428, 107 So. 557 (1926), and Aetna Ins. Co. v. Robertson, 126 Miss. 387, 88 So. 883 (1921), held corporations domiciled in other states, and not domesticated in Mississippi to be non-residents so that they might be made defendants in chancery attachments.

In the Clark Case, *supra*, it was held however that a non-resident railroad corporation, having lines and property in this state, and subject to service of process herein might be made attachment garnishees.

So the court in the instant case, when it says, "This seems to be a clear legislative definition of the words 'persons in this state' in section 173 (Chancery Garnishment Statute) as person residing in this state," either overlooks the holding in the Clark case, which it does not mention in the opinion, or distinguishes between a non-resident temporarily within the state and one more or less permanently within the jurisdiction of the court, though it does not announce such a distinction.

[15]Gulley, State Tax Collector v. Mathews, 179 Miss. 579, 176 So. 277 (1937).

[16]180 Miss. 198, 177 So. 43 (1938).

[17]180 Miss. 499, 177 So. 363 (1938).

plainants' clinic, and in which it was agreed that in the event the contract was terminated, the defendants were not to practice the profession of medicine within a limited locality for a period of five years from the date of the termination.

A dispute arose as to compensation due the defendants under the contract, and the defendants claiming that the complainants had breached their contract in regard to compensation, withdrew from the services of the complainants and entered into the practice of medicine within the territorial limits contemplated by the contract.

The court held that in order for the complainants to seek injunctive relief, they must have fully kept and performed their obligations under the contract in so far as they were requested to do so by the defendants, and that having done so, as found by the court, they were entitled to the relief sought, since the contract was reasonably limited as to time and territory of the restricted activity.

The case of *Stephenson v. N. O. & N. E. R. R. Co.*,[18] involves a question of the right of individual employees of an employer to enforce by equitable and injunctive relief the performance of a contract entered into by the employer and a labor union.

The court has already decided that equitable jurisdiction would be taken in the proper cases to enforce contracts made between the employers and labor unions where the party to the suit was the labor union itself,[19] and it has been held in this state that an individual who comes within the class of employees to be benefited by a contract between a labor union and an employer may sue at law to enforce the contract, on the theory that he is a third party beneficiary.[20] Basing its opinion upon these two cases, the court holds that if a court of equity has jurisdiction of the subject matter of the suit, an action for injunctive relief may be maintained by the employees individually, as members of the class of employees covered by the contract made with the employer and for their benefit by the labor union.

Reaffirming the holding in the case of *Floyd v. Adler*,[21] that the fact that although certain conduct may be punishable as a crime it does not prevent an equity court from taking jurisdiction on the theory that there is an adequate remedy at law where a

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[18]180 Miss. 147, 177 So. 509 (1938).
[19]Miss. Theatres Corporation v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 587 (1936).
[20]Y. & M. V. R. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).
[21]96 Miss. 544, 51 So. 897 (1910).

basis for equitable jurisdiction otherwise exists, the court in the case of *State Ex Rel Rice, Attorney General v. Allen,*[22] decided that a remedy by injunction is available to the state to enforce the provisions of the statute[23] providing for a mandatory collection of the sales tax by merchants where the efficiency of the State Tax Collector in assessing and collecting the tax is impaired by the failure of the defendant to obey the statute, even though the statute provides for a criminal prosecution for non-compliance.

XI.

TAXATION

*John W. Wade**

A. Constitutionality

Cases involving the constitutionality of tax statutes indicate that the Supreme Court of Mississippi, like the Supreme Court of the United States, is currently adopting an attitude of judicial self-restraint and is unusually hesitant to declare a legislative act invalid. Thus, of the four cases in which the constitutionality of a statute was in issue the statute was upheld in every one. And at least three of these cases were very difficult.

By far the most important of these cases was that of *Albritton v. City of Winona,*[1] involving the constitutionality of the Balance-Agriculture-with-Industry Act.[2] This act authorized municipalities of the state, subject to the approval of an industrial commission which had been created by the act, to purchase lands, erect industrial plants and "to sell, lease or otherwise dispose of [the] industrial enterprise" so that it might be properly operated, or to operate the enterprise themselves. To the objection that the act constituted a violation of due process of law in that it authorized the imposition of taxes for a private purpose, the court responded that the purpose here was a public one. Chief Justice Smith pointed out the lack of definite meaning in the phrase "due process of law"; and after remarking upon the process by which the Federal Supreme Court had read "substantive as well as procedural rights" into the phrase, he declared that the constitutional law in

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[22]180 Miss. 659, 177 So. 763 (1938).

[23]Miss. Gen. Laws (1936) c. 155.

*A.B. (1932); LL.B. (1934) Univ. of Miss.; LL.M., Harvard (1935); Member Mississippi Bar; Associate Professor of Law, Univ. of Miss. School of Law.

[1]178 So. 799 (Miss. 1938); appeal dismissed "for the want of a substantial federal question", 58 S. Ct. 766 (1938).

[2]Miss. Laws (1st Ex. Sess. 1936) c. 1.

this respect must "grow and keep pace with social and economic needs." Laying much emphasis upon the broadening and expanding characteristics of the concept of public purpose, he held that the preamble to the Industrial Act showed the need of the provisions of the act to grant relief to the unemployed, to aid agriculture and to create a balance between agriculture and industry. The instant case was distinguished from the previous one of *Carothers v. Town of Booneville*,[3] which had held a similar private act unconstitutional primarily by means of the preamble in the Industrial Act.

Additional objection to the act was based upon sections 183 and 258 of the Mississippi Constitution, which prohibited any municipality from making appropriation or loaning its credit to any corporation or association or from subscribing to its stock. The court held that these sections did not prohibit the leasing of property when such property was to be used for a public purpose.[4]

Mr. Justice Griffith, in a specially concurring opinion, took the view that the only justification for the act was the relief from unemployment which it would grant. This was considered to mean that the only constitutional method by which the property could be leased was by including in the lease provisions as to hours, wages and other aspects of employment.

Mr. Justice Anderson rendered a vigorous dissenting opinion. The act, according to him, unquestionably violated sections 183 and 258 of the Mississippi Constitution, in that the leases were made to attract industries to the municipality and would therefore be so favorable to the lessee as to amount to the lending of aid, either by appropriation or loan of credit. The fact that this might be held to be a public purpose was not relevant, because the prohibition applied even to the giving of aid to railroads, which have always been considered as public utilities. He also assigned other grounds for unconstitutionality.[5]

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[3]169 Miss. 511, 153 So. 670 (1934).

[4]Carothers v. Town of Booneville, 169 Miss. 511, 153 So. 670 (1934), was distinguished on the ground that the lease there was for a private purpose, whereas this lease was for a public purpose.

The Court makes no reference to the additional power given the municipality "to sell . . . . or otherwise dispose of" the property; but it is perhaps reasonable to assume that a similar conclusion would be reached in case of a sale.

[5]For a detailed discussion of the constitutionality of the Industrial Act, written prior to the rendering of the decision in the Albritton case, see Note (1937) 9 Miss. L. J. 356.

In *Tatum v. Wheeless*,[6] there was involved the constitutionality of the Mississippi Unemployment Compensation Law[7] and the part of the federal Social Security Act[8] on the subject of Unemployment Compensation. Relying heavily upon the Social Security cases decided by the U. S. Supreme Court[9] and quoting copiously from them, the court upheld the constitutionality of the provisions.

In *State* ex rel. *Rice v. Allen*,[10] it was held that the provisions in the sales-tax law requiring merchants to collect the sales tax from customers was not unconstitutional. The general features of the sales tax had already been held constitutional.[11]

Russell Inv. Corporation v. Russell[12] involved the constitutionality of Chapter 196 of the Laws of 1934, which limited to two years the time during which actions might be brought to cancel the state's title to land which had been forfeited for taxes. The statute was upheld. The legislature may limit or shorten the period during which an action may be brought, provided a reasonable time is allowed. But the earlier case of *Dingey v. Paxton*,[13] which had declared a similar statute unconstitutional, was distinguished only on the ground that the facts in that case showed that the taxpayer and owner had remained in possession of the land while the statute was running; and the court in the instant case found it necessary to limit the application of the 1934 statute to situations where the owner had not remained in possession. Otherwise, it was said, the act would not operate merely as a statute of limitation cutting off a right of suit, but would also convert an estate in possession into a simple right of action and limit the time for bringing that action. The court also made it clear that the statute could not apply to constitutional or jurisdictional defects or deficiencies.

B. General Property Tax

A large majority of the cases on the general property tax are concerned with the validity of tax titles to real property. These cases portray faithfully the usual judicial attitude towards tax titles. There is an element of forfeiture involved, and the court

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[6]180 Miss. 800, 178 So. 95 (1938).

[7]Miss. Gen. Laws (1936) c. 176, as am'd. Miss. Laws (1st Ex. Sess. 1936) c. 3.

[8]42 U. S. C. A. §§ 301 *et seq.*

[9]Carmichael v. Southern Coal & Coke Co., 301 U. S. 495 (1937); Steward Machine Co. v. Davis, 301 U. S. 548 (1937); Helvering v. Davis, 301 U. S. 619 (1937).

[10]180 Miss. 659, 177 So. 763 (1938). Other aspects of this case will be discussed later.

[11]Notgrass Drug Co. v. State *ex rel* Rice, 175 Miss. 358, 165 So. 884 (1936).

[12]182 So. 102 (Miss. 1938) on sugg. of error from 178 So. 815 (1938).

[13]60 Miss. 1038 (1883).

construes the statutes strictly in favor of the taxpayer. Each step or requirement laid down by the statute must be completely and literally complied with. The statute is not subject to any broadening interpretation. In the words of Chief Justice Smith, *"Ita lex scripta est."*[14]

Thus, of the seven cases involving the validity of a tax title to real property, the title was held void in five, and there were defects present in the sixth which would have invalidated the title except for the statute of limitations.

Even in *Pettibone v. Wells*,[15] the one case upholding the validity of the tax title, the court starts with the declaration

> "that a Board of Supervisors is a court of special and limited jurisdiction in assessing property for taxation, and that the records of the Board of Supervisors should affirmatively show all jurisdictional facts to have existed when the board proceeded to act in making the assessment roll final, and in its proceedings in equalizing and assessing taxes."

The primary problem in the case was whether the order on the minutes of the Board might set out simply the notice given to taxpayers of the August meeting for equalization of assessments together with the recital of publication and posting, or whether it must also include proof of publication. The ruling was that "The publication of the notice is the jurisdictional fact, while the proof of publication is an evidentiary fact . . . ; and it is the ultimate jurisdictional facts, as distinguished from the evidentiary facts, which are required to be recited in the order of the Board of Supervisors."

Other rulings were to the effect that the requirement that the assessor attend the August meeting is not jurisdictional, and that publication need not be in more than one issue of the paper, the time of publication and not the number of times being the important factor.

Another problem concerning the meeting of the Board of Supervisors for equalizing taxes was raised in *Sharp v. Smith*.[16] The Supervisors of Hinds County, which has two districts, met under the provisions of chapter 256 of the Laws of 1876, on the first Monday in August at Raymond and later moved to Jackson for a "continued meeting". It was held that the action at the Jackson

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[14]Lamar Life Ins. Co. v. Mente & Co., Inc., 178 So. 89, 90 (Miss. 1938).
[15]179 So. 336 (Miss. 1938).
[16]180 Miss. 887, 178 So. 595 (1938).

meeting was unauthorized by statute and void. The difficulty thus raised for counties with two districts has of course been eliminated under the Mississippi Code of 1930. Section 3162 now provides that the Board of Supervisors shall designate the days in August when it will meet in each of the two districts.

The principle laid down in *Carr v. Barton*,[17] that the assessment rolls must contain a description sufficient in itself to identify the property[18] and that the column on the rolls containing the description will not be aided by the column containing the name of the owner, is reasserted in the case of *Brown v. Womack*,[19] where the tax title was held void. The description, of course, must not only be good on the assessment rolls, but also in the tax deed itself. In *Evans v. Shows*,[20] a tax deed with a defective description was held not even to constitute color of title.

It had been held in 1931[21] that where the descriptions in both the assessment roll and the tax deed were inadequate, even the three-year statute of limitations in favor of tax titles would not aid the purchaser. There is language in *Russell Inv. Corp. v. Russell*[22] which will justify the conclusion to be drawn from the 1931 case that the same result would be reached when the description on the assessment rolls alone was inadequate.

In *Byers Mach. Co. v. Cobb Bros. Const. Co.*,[23] a more liberal decision was reached regarding the description required in assessing personal property. The statute requires the assessor to set down on the roll "each item of personal property liable to taxation."[24] One Gaines was assessed with "machinery, tools, implements and equipment—$7,000." In holding the description adequate the court referred to the history of the section, recalling that it appeared in prior codes, which also provided at the same time for the listing of the "amount of all property not otherwise enumerated." This and the forms issued by the State Tax Commission

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[17]173 Miss. 662, 162 So. 172 (1935). See also Ransom v. Young, 176 Miss. 194, 168 So. 473 (1936).

[18]Miss. Code Ann. (1930) § 3151, allowing parol evidence is held not to help unless the description itself contains the "clue to the particular land."

[19]178 So. 785 (Miss. 1938).

[20]180 Miss. 518, 177 So. 786 (1938).

[21]Patterson v. Morgan, 161 Miss. 807, 138 So. 362 (1931).

[22]181 So. 102, 105 (Miss. 1938). The case involved not the regular 3-year statute of limitations, but a special 2-year one found in Miss. Laws (1935) c. 196. The first opinion in the case (178 So. 815) was concerned only with the interpretation of this act holding that when it referred to "lands heretofore sold or forfeited to the state", it included such lands although the period for redemption had not passed. The opinion on suggestion of error (181 So. 102) treats the constitutionality of the act.

[23]179 So. 565 (Miss. 1938).

[24]Miss. Code Ann. (1930) § 3128.

were held to show that it was not necessary to list each item separately. The description in the bill of sale of a gasoline shovel as "one gas shovel" was also held not to invalidate the tax sale.[25]

There are two cases involving the details of the tax sale itself. *Lamar Life Ins. Co. v. Mente & Co., Inc.*,[26] involved the code sections[27] requiring the chancery clerk, before a tax sale, to search the record for deeds, mortgages, *etc.*, for six years prior to the sale and to send by registered mail notice to such vendees or lienors, and then to enter upon the tax-sale book a notation showing that he has done this. The clerk's notation showed that he had mailed "notice required by law." It was held that the lienors were not bound by the sale because the language was not sufficient to show that registered mail was used. Nor could it be shown by parol that registered mail was used or that the lienor actually received the notice.

In *Smith v. Hendrix*,[28] the Board of Supervisors, under the authority of Mississippi Code section 3252 allowing them to set the time for a tax sale if the sale was not made "at the time appointed by law", had in July, 1932, fixed the date for the sale of certain lands. Under the Mississippi Code of 1930, the time fixed by law for the sale was the first Monday in April, but an act passed in 1931 added also the third Monday in September as a legal date for sale. It was held that the sale was void; until both legal dates had expired the Board of Supervisors had no power to set another date.

Of the few cases on the general property tax not involving tax titles, *Board of Supervisors of Hinds County v. Jackson Hospital Benevolent Ass'n.*[29] is perhaps the most important. It involved the exemption from tax of hospitals maintaining charity wards, where all the income is used for hospital purposes and none for profit.[30] The Jackson Hospital Benevolent Association was organized to take over the Jackson Infirmary. In so doing the Association issued bonds which it exchanged as a part of the purchase price for the indebtedness of the Infirmary, including the capital stock of the latter. Part of the money now being made by the As-

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[25]Since the court is here liberally construing the tax statute and upholding a tax title, it may perhaps be pointed out as significant that it also held that the taxpayer still had his right to redeem. There was therefore no forfeiture.

[26]178 So. 89 (Miss. 1938).

[27]MISS. CODE ANN. (1930) §§ 3259-61.

[28]178 So. 819 (Miss. 1938).

[29]180 Miss. 129, 177 So. 27 (1937).

[30]MISS. CODE ANN. (1930) § 3108(f), as am'd. by Miss. Laws (1932), c. 289.

sociation is being used to pay interest on the bonds (eighty per cent of which are now in the hands of the incorporators of the Association). The court affirmed the decision of the circuit court granting the exemption, saying that the money was being used merely to liquidate a debt and that there was no finding that the purchase price was excessive or the debt fictitious.

In *Grenada County v. Shaw*,[31] the court held that under the statute[32] the Board of Supervisors might at any regular meeting prior to the date of making a levy in October, declare their intention of levying a school tax of a certain number of mills. The prohibition in this section against a reduction of the tax after the July meeting would not prevent an increase after that time.

Where the Board of Supervisors had left certain vacant city lots belonging to a railroad for the State Tax Commission to assess, and the Tax Commission had so assessed them, it was held in *Gully v. Mississippi Valley Co.*[33] that the State Tax Collector could not now have these lots back-taxed because they had not been used for railroad purposes.

In *Atlantic Life Ins. Co. v. Klotz*,[34] it was held that the 1936 moratorium act did not apply to tax liens or to special assessments.

C. Special Assessments

In *City of Clarksdale v. Fitzgerald*,[35] the city officials had almost completed certain paving before they made any attempt to comply with legal requirements for imposing special assessments of benefits. It was held that the assessment was still binding under the statute[36] authorizing them to take steps to cause a new assessment whenever there was any defect in any special assessment. Constitutional objections were overruled because the property owners were not entitled to notice and a hearing on the question of whether the pavement would be laid but only on the amount of their individual assessments.

Fighting Bayou Drainage Dist. v. Leflore County[37] involved the question of the liability of sixteenth-section lands for drainage assessments. The county superintendent of education had leased the land for several years to one Manning, and his action had been approved by the Board of Supervisors; but no order had been

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[31]181 So. 733 (Miss. 1938).
[32]Miss. Laws (1st Ex. Sess. 1936) c. 1, § 15.
[33]180 So. 745 (Miss. 1938).
[34]181 So. 519 (Miss. 1938).
[35]179 So. 269 (Miss. 1938).
[36]Miss. Gen. Laws (1934) c. 246, § 5.
[37]180 Miss. 223, 177 So. 6 (1937).

entered on the minutes as required by statute.[38] The court held that this made him a tenant at will only, and that the county was therefore still liable for the assessments, since a lease of this nature was not contemplated by the statute making the lessee liable.[39] An additional reason under the statute applying during the later years lay in the fact that it provided that in the discretion of the Board of Supervisors the taxes might be paid by either the county or the lessee; this lease did not impose liability on the lessee. Justice Ethridge dissented on the ground that either Manning or the drainage district might have brought a writ of mandamus forcing the Board of Supervisors to enter their approval on the minutes and that equity regards as done that which ought to have been done. He felt, too, that in the event the Board did not assume the taxes, that fact automatically imposed them on the lessee.

The well-known principle that bondholders may bring mandamus proceedings against drainage commissioners to require them to levy and collect assessments was illustrated in the cases of *Teoc Sub-Drainage Dist. v. Halliwell*[40] and *Anderson v. McKee.*[41] In the later case, however, the court added that although the plaintiff was entitled to a writ requiring the commissioners to meet and act upon the matter, it was still within their discretion as to whether the benefits which might be assessed equalled the amounts of the claims. If, in their judicial discretion they find that the benefits received do not equal the amounts of the claim, the court cannot force them to assess an amount equal to the claims.

D. Income Taxes

Chapman v. State[42] involved the question of whether money received from the federal government under the Agricultural Adjustment Act was subject to the state income tax. Avoiding the question of whether this would be imposing a tax upon an instrumentality of the federal government, the court said:

> "Obviously, an activity or instrumentality of the government must be authorized by law, else it is not a governmental activity, but is one in which those who mistakenly act as if for the government are, in fact, acting as individuals; and, therefore, are not acting at all so far as the government is legally concerned."

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[38]Miss. Code Ann. (1930) § 6769.

[39]Miss. Laws (1924) c. 267 for part of the time; Miss. Code Ann. (1930) § 6767 for the rest.

[40]180 Miss. 720, 178 So. 84 (1938).

[41]179 So. 858 (Miss. 1938).

[42]179 Miss. 507, 176 So. 391 (1937).

For the same reason this money was not exempt as a gift. "There is no such thing as a gift by the government unless it be authorized by a valid act of Congress, and here, there was no such valid act." The money was therefore subject to tax.

The problem of whether a profit made from the sale of property not used in a regular trade or business of the taxpayer is subject to the income tax was raised in *Virden v. State Tax Com'n.*[43] The State Tax Commission, in its regulations, had interpreted the income-tax law of 1934[44] as not laying a tax on such sales, thus adopting the English view.[45] It seems to have changed its practice, however, since it assessed a tax against the plaintiff in this case. The court agreed that the profit was taxable, following the view of the Federal Supreme Court.[46] The decision is not of extreme importance, since it interprets the 1934 act, and amendments in the 1936 act[47] more clearly indicate an intent to tax such profits.

E. Privilege Taxes

Hugo v. City of Oxford[48] involves the license tax imposed upon "checking agents in the business of checking the affairs of business concerns for persons . . . . engaged in the business of disseminating information for commercial purposes."[49] It was held that the tax applied only where the information was to be "spread abroad . . . . to whomsoever will pay for it", and not to an individual checking on theatres and submitting a confidential report to his employers.

Busses operated in lieu of street cars, entirely within the limits of a municipality were held exempted from the mileage tax under chapter 126 of the Laws of 1934 in *Craig v. Mississippi Power & Light Co.*[50] The court seemed influenced by the fact that such busses were expressly exempted in 1936.[51] But a tax is imposed under the current law.[52]

F. Tax Collection

The subject of tax collection has been made a separate subtopic because of the case of *State* ex rel. *Rice v. Allen.*[53] In this case a bill was brought by the State for a mandatory injunction,

[43]180 Miss. 467, 177 So. 784 (1938).
[44]Miss. Gen. Laws (1934) c. 120.
[45]See Magill, Taxable Income (1936) 70-90.
[46]Merchant's Loan & Trust Co. v. Smietanka, 255 U. S. 509 (1921).
[47]Miss. Gen. Laws (1936) c. 151.
[48]179 Miss. 450, 176 So. 156 (1937).
[49]Miss. Gen. Laws (1936) c. 154, § 15.
[50]180 So. 604 (Miss. 1938).
[51]Miss. Gen. Laws (1936) c. 161, § 1.
[52]Miss. Gen. Laws (1938) c. 148, §§ 2(32), 3(3)(c).
[53]180 Miss. 659, 177 So. 763 (1938).

forcing a merchant to collect the sales tax from his customers. The chancellor below had declined to take jurisdiction, but his action was reversed by the Supreme Court. The statute had made it a misdemeanor to fail to collect the tax and had prescribed penalties for such failure. To the defendant's argument that equity should not try to enforce the criminal laws and that there was an adequate relief, the court replied by quoting a single sentence from a treatise on equity:

> "Though equitable action is never predicated on the prevention of crime, as such, it is also true that the fact that conduct is punishable criminally does not constitute an adequate remedy so as to bar equitable relief."[54]

It then added that "the efficiency of the appellant's tax collector in ascertaining and collecting the tax is being impaired by the failure of the appellees to obey the statute."

This case, together with one decided in 1936,[55] seems to have committed the court to the policy of allowing the court of equity to be used as a tax collector. Thus, when the instant case was sent back to the court below, that court issued an injunction whereby the defendants were

> "commanded and enjoined from further failing and refusing to comply with the provisions of Chapter 155 Laws of 1936, by failing and refusing to collect the taxes imposed by Section 2-c of Chapter 119 Laws of 1934; and you are hereby required to collect said taxes due by you under said Section 2-c of Chapter 119 Laws of 1934, from each purchaser of all property sold by you, at the time the sales price is collected, and in addition thereto. [*sic*]
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> "You are further hereby commanded to fully comply with all the rules and regulations promulgated by the Chairman of the State Tax Commission, including the use of tokens, or such other means as may be supplied and required by the Commissioner, to enable you to collect the amount of taxes required upon each and every sale; and

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[54]LAWRENCE, EQUITY JURISPRUDENCE (1929) § 1099 (erroneously cited in the opinion as § 1009).

[55]State *ex rel* Rice v. Hasson Grocery Co., 177 Miss. 204, 170 So. 234, (1936). Action was brought against the members of an unincorporated association, organized to contest the constitutionality of the motor vehicle tax but which had continued to refuse payment after the tax had been held constitutional, to enjoin them from continuing to use the highways and to force them to pay the tax. It was held that equity should take jurisdiction and grant relief, but there is no concrete indication of the extent of the relief. For comment on the case see (1938) 9 Miss. L. J. 189.

> make all proper returns and pay all taxes due by you on account of business conducted by you, in full compliance with the law and the rules and regulations of the Chairman of the State Tax Commission, under the full penalty of the law."[56]

In other words, practically every step in the administration and collection of the sales tax (and any other tax on the business) was placed under the detailed supervision of the court of equity. If the defendants vary in any slight degree from any of the rules or regulations of the State Tax Commission, whether innocently or not, they may be held guilty of contempt of court and punished accordingly.

When it is recalled that equity may take jurisdiction and grant an injunction of this sort whenever the "efficiency of the . . . tax collector in ascertaining and collecting the tax is being impaired by the failure . . . to obey the statute", some idea of the vast implications of the *Allen* case may be obtained. There seem to have been no precedents either for or against the holding in the case.[57] The situation most nearly analous is the use of equity to enforce provisions of the criminal law. And it is well known how extremely careful and reluctant courts of equity have been in granting injunctions which might even indirectly have that effect.

Very probably, the remarkable possibilities of the *Allen* and *Hasson* cases will not be developed, and the court will soon limit their application.

Gully v. Matthews[58] involved a situation where both the local sheriff and the state tax commissioner were trying to collect the privilege tax imposed upon slot-machine operators. The commissioner had brought some eighty-odd suits against the operators, and the sheriff had later brought suit also. The commissioner then brought this bill in equity to enjoin the sheriff from maintaining his suits. The injunction was granted. In a private suit, only the defendant harassed by the two suits might complain, but these were suits involving public officers. "It is against the interest of the state for its public officers to spend their time in dupli-

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[56]The injunction is of course not set out in the reports. It is included here at such length because of its importance.

[57]Unless the Hasson case, *supra* n. 55, is considered to be one. One factor making that case easier lay in the fact that the statute imposing the tax provided for a resort to a court of equity to enjoin the use of the highways when the tax was not paid. Equity once having taken jurisdiction, it might be simpler to grant additional relief. The extent of the injunction finally granted in that case is not known.

[58]179 Miss. 579, 176 So. 277 (1937).

cating each other's action; their time and often the expenditure of public funds would be involved."

The use of distress for the collection of taxes is discussed in *Byers Mach. Co. v. Cobb Bros. Const. Co.*[59] A bondholder's right to mandamus requiring drainage district commissioners to levy and collect special assessments is the subject of two cases.[60]

XII.

TORTS AND NEGLIGENCE

*Wex S. Malone**

A. Intentional Aggressions

(1) Assaults, Restraints—Conduct of Peace Officers

In most discussions of False Arrest the principal dispute concerns the existence or non-existence of "probable cause" or reason to suspect that the person apprehended is the desired felon. Two decisions on this problem were handed down by the Supreme Court during the past year, and both were unfavorable to defendants. The first[1] involved an action against a sheriff. He had been instructed by phone to take into custody the driver of a car bearing a designated license number, but he could not elicit from his informant either the reason for the arrest or the grounds for believing that the driver was the desired felon. He was told only that his informant would appear later. In holding defendant liable for a wrongful arrest the court stated that an officer, when acting without warrant, must be prepared to justify his conduct by showing good factual reason to definitely suspect the person apprehended, not a mere possibility. However the court carefully avoided any intimation that an arrest cannot be made upon reliable detailed information communicated by a responsible person over the telephone. The other case, *Howell v. Viener*,[2] is more difficult. Defendant, a private citizen, had received from a Federal agent the serial numbers of certain bills which he was told were counterfeit. The same numbers were similarly handed to neighboring merchants. Later, plaintiff, a stranger, handed defendant a bill bearing numbers which tallied with those previously

[59]179 So. 565 (Miss. 1938).

[60]Teoc Sub-Drainage Dist. v. Halliwell, 180 Miss. 720, 178 So. 84 (1938); Anderson v. McKee, 179 So. 858 (Miss. 1938).

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[1]Laster v. Chaney, 180 Miss. 110, 177 So. 524 (1937).

[2]179 Miss. 872, 176 So. 731 (1937).

presented by the Federal agent. Defendant verified his suspicion by checking against the numbers left with his neighbors. Acting on this information defendant procured plaintiff's arrest by a peace officer. No warrant was procured because it was apparent that plaintiff was about to leave the community. However, upon later consultation with a local bank it was determined that plaintiff's bill was genuine and the latter was promptly released. The lower court granted a peremptory instruction for defendant. On appeal the judgment was reversed and the case remanded. The court declared the evidence was squarely in conflict "as to whether the bill had the counterfeit serial number or a different one", and the burden of showing "probable cause" was on defendant. This statement would doubtless be true and would be ample ground for reversal if the issue involved were whether or not plaintiff was actually guilty of passing counterfeit money. However, such is not the case here. The only question was the existence or absence of "probable cause" (reasonable ground for belief in plaintiff's guilt). The evidence was uncontradicted that, according to the list handed defendant by a proper Federal agent, plaintiff's bill bore a counterfeit serial number. Nor was it disputed that defendant verified his suspicion by a careful check with others whom the agent had contacted. If the facts on which defendant's belief are based are undisputed, the question of "probable cause" is one solely for the court. If the public is to be encouraged to aid in the apprehension of counterfeiters it must be permitted to rely on detailed information furnished by proper Federal agents, provided its action is otherwise reasonable and involves no more violence than the circumstances permit.

In the case of *Moore v. Foster*[3] the court reaffirmed the proposition that a peace officer cannot shoot a fleeing misdemeanant without incurring liability therefor; and where several peace officers discharge firearms to frighten such person, resulting in a wounding, all are jointly liable as principals for the negligence.

In *Taggert v. Peterson*[4] the court considered the question of exemplary or punitive damages. It reiterated the well-established rule that such damages do not accrue to plaintiff as a matter of right whenever defendant acts wilfully or with reckless disregard of the consequences. On the contrary, the assessment of punitive damages rests in all cases within the discretion of the jury.

The difficulty of determining when a peace officer is acting "by virtue of or under color of his office so as to render his

[3]180 So. 73 (Miss. 1938).
[4]181 So. 137 (Miss. 1938).

bondsmen liable for his conduct was apparent from two recent cases. In *State for Use of Dew v. Lightcap*[5] it was virtually held that where an officer makes an assault while questioning a suspected person his bondsmen are not liable, provided the officer has asserted at the time that he is not officially making an arrest. Whether an officer must be in the act of making an arrest in order to be acting "under color of" his office appears open to serious question. Perhaps the fact that the assaulted plaintiff was not the person being questioned influenced the court's determination. In the other case[6] the assault was made some time after the officer had handed plaintiff a summons, and occurred at a different place. The decision that the bondsmen were not liable appears clearly correct.

In *Wray v. McMahon et al.*[7] it was held that municipal officials are not personally liable for the torts of peace officers, even though they might have known upon reasonable inquiry that the officer appointed was dangerous and prone to make assaults. Their action, said the court, is official, and not individual, in the absence of a statute making them personally liable. Such a result as that reached is necessary to the prompt and efficient discharge of governmental duties, and to encourage candidacy for public office.

B. Negligence

An instruction to the jury that it should return a verdict for plaintiff if it believes that he was injured by reason of the negligence of the defendant, or if it believes the defendant was negligent and that this was the cause of the injury, was held erroneous in three separate decisions during the past year.[8] Such an instruction does not limit the fancy or imagination of the jury as to what negligence it might be conceived the defendant was guilty of. The default of defendant must be in relation to definite acts or omissions. Particularly is this true where the plaintiff's attack on trial indicates several different particulars in which he claims defendant was delinquent.

The doctrine of *res ipsa loquitur* was designed to allow an injured plaintiff access to the jury when the accident occured under such circumstances that an adequate explanation would probably indicate a want of reasonable care, and yet plaintiff is unable to

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[5]179 So. 880 (Miss. 1938).
[6]Taggert v. Peterson, 181 So. 137 (Miss. 1938).
[7]182 So. 99 (Miss. 1938).
[8]McDonough Motor Express v. Spiers, 180 Miss. 78, 176 So. 723 (1937) *on suggestion of error*, 180 Miss. 78, 177 So. 655 (1937); Ross v. L. & N. R. Co., 181 So. 133 (Miss. 1938); Graham v. Brummett, 181 So. 721 (Miss. 1938).

produce evidence of the details leading to responsibility because they are exclusively within the knowledge and control of defendant. In such case plaintiff is not relieved of the responsibility of ultimately convincing the jury of defendant's fault. But the mere occurrence of the injury under peculiarly suspicious circumstances enables plaintiff to avoid a peremptory instruction being entered against him, and throws on defendant the task of proceeding with the evidence since he alone is in possession of those facts which can adequately explain the accident. Hence *res ipsa loquitur* is not a rule of substantive law, but is a part of the mechanics of trial procedure. It creates no new duties, raises no presumption and is not to be treated as a substitute for the production of detailed evidence by plaintiff where such is available or necessary to cast a reasonable suspicion of fault on defendant. Attempts by litigants to "ride home" on the doctrine of *res ipsa loquitur* were denied by the court in two recent decisions. An excellent discussion of the limits of the doctrine will be found in *Yazoo & M. V. R. R. v. Skaggs*.[9] In the other case, *Evans v. Hill*,[10] the facts of the case showed no duty on the part of defendant to use care, and the court held in effect that *res ipsa loquitur* could not serve to create a duty where none otherwise existed.

No rule in the network of negligence theories has given more trouble than the limitation that a negligent defendant cannot be held responsible for an injury unless his fault was the *proximate cause* thereof. Of course the defendant's conduct must have been a substantial factor in producing plaintiff's injury, but in the vast majority of "causation" problems there is little real doubt that defendant's delinquency was such a factor. When the court employs the unintelligible language of causation as an explanation of its refusal to grant relief to plaintiff it is usually motivated by reasons of policy rather than the metaphysics of causation rules. The solution of negligence cases through the language of causation is most strikingly inappropriate and confusing in those situations where the wrongful conduct of defendant consists solely of the violation of some statutory provision. The question in such cases is clearly: Was the statute designed to protect against this particular type of injury or wrong? Yet the issue is generally urged on the court as a problem of causation (Was the violation of the statute the proximate cause of the injury?). In *Mississippi Power & Light Co. v. Garner*[11] plaintiff, a negro woman, was assaulted by an unknown white passenger for refusing to surrender her seat in the rear of defendant's motor stage. The only alleged default

[9]179 So. 274 (Miss. 1938).
[10]181 So. 847 (Miss. 1938).
[11]179 Miss. 578, 176 So. 280 (1937).

of defendant was its failure to obey Chapter 332, Section 9, Mississippi Laws 1932, requiring a substantial partition between those sections of the coach set apart for white and colored respectively. The court astutely resolved the "causation" contention into its proper setting: Was the statute designed to afford protection against inter-racial assaults in public conveyances? The question was answered in the affirmative and judgment entered for plaintiff. In *Simon v. Dixie Greyhound Lines*[12] plaintiff was injured when, blinded by the lights of defendant's bus, he ran his car into a ditch. At the time of the accident the bus was 100 yards in front of plaintiff and had parked with its lights on. The alleged wrong of defendant was its position two feet over the center of the road in violation of statute. The court held that the negligence of defendant did not contribute to the accident. Although it is not unlikely that the position of the bus on the highway did affect the angle of the lights and hence contributed to the injury, yet it is equally clear, as contended by defendant, that the statute violated was designed to minimize accidents occasioned to *passing* vehicles and was not intended to prevent dangers from glare of headlights. In another case[13] plaintiff was waiting at a flag station to watch the passing of a new special train which he understood was to go by that day. No such information was disseminated by defendant railroad. A passing freight train of defendant was derailed and crashed into the flag station, giving rise to the plaintiff's injuries. Plaintiff contended that the wrongful derailment was the proximate cause of the injury. The court adroitly handled the issue as follows:

> ". . . . in order to recover for an injury to person or property, by reason of negligence or want of due care, there must be shown to exist some obligation or duty toward the plaintiff which the defendant has left undischarged or unfulfilled. . ."

Thus, assuming that defendant was negligent to someone, it does not follow that the rule of law demanding reasonable care to avoid a derailment was designed to protect against hazards such as that encountered by plaintiff. This, rather than causation, was the real problem before the court, and was so recognized.

Even though the action of plaintiff himself or of a third person is the immediate factor in point of time contributing to the injury, yet if the wrong of defendant in inducing such independent action consists in failure to guard against hazards such

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[12]179 Miss. 568, 176 So. 160 (1937).
[13]Gulf, M. & N. R. R. v. Sparkman, 180 Miss. 456, 177 So. 760 (1938).

as that to which plaintiff was exposed, there is no reason why defendant should not be held liable despite any so-called "rule" of causation (if any) to the contrary. Thus in *Tri-state Transit v. Martin*[14] where the driver of defendant's bus wrongfully discharged plaintiff in the country several miles from the point called for by her ticket defendant was held liable for a sunstroke which she suffered during a four mile walk in the August sun. The court had little difficulty in concluding that defendant's wrong was the proximate cause of the injury sustained. That defendant's wrong was a substantial factor in bringing about the injury complained of will hardly admit of serious dispute, and that the injury suffered was within the zone of hazards making defendant's conduct wrongful seems reasonably clear. A similar case[15] involved the intervening conduct of a third person who, in falling from a defectively constructed stadium involuntarily grasped plaintiff and pulled him down. The defendant city, operator of the stadium, was held responsible for the resulting injury to plaintiff despite defendant's contention that the intervening act of a stranger was the sole and proximate cause. See also *Adams v. Hicks*[16] where an employee of a stockyard was injured by stampeding cattle as a result of a defective system of release inaugurated by the defendant employer. It was unimportant that some third person, acting under the system, had released horses which frightened the cattle. Although proximate cause was argued by counsel in all the above cases, yet it appears that in none of them was there serious doubt that defendant's conduct was a substantial factor in bringing about the accident.

C. Comparative Negligence

Omissions to affirmatively plead and request instructions on the comparative negligence of plaintiff are becoming increasingly frequent. It is well settled that such omission precludes defendant from urging on motion for a new trial that the jury did not take into consideration the plaintiff's own negligence in arriving at the amount of recovery. If defendant fails to make an issue of comparative negligence, is plaintiff entitled to an instruction that the jury should return full damages irrespective of the plaintiff's own contributing fault? In *Graves v. Johnson*[17] such an instruction was held erroneous. The policy of the court, gathered from this and previous decisions, appears to be that where comparative negligence is not tendered as an issue, the advisability of mitiga-

[14]179 So. 349 (Miss. 1938).
[15]City of Jackson v. McFadden, 177 So. 755 (Miss. 1937).
[16]178 So. 484 (Miss. 1938).
[17]179 Miss. 465, 175 So. 256 (1937).

tion must be left to the unbridled discretion of the jury without aid of instruction, and their verdict will not be disturbed at the instance of either plaintiff or defendant. It was recently held, however, that upon failure by defendant to tender an issue on comparative negligence plaintiff is entitled to an instruction that his own negligence should not operate as a bar to recovery.[18] In theory such an instruction is unobjectionable, due to the fact that the common law doctrine of contributory negligence is not applicable in this jurisdiction. In practice, however, such an instruction might well suggest to the untutored mind of the jury that it should return full damages irrespective of plaintiff's own fault, thus accomplishing by indirection the same evil present in the instruction which the court criticized in *Graves v. Johnson, supra.*

In *Gulf & S. I. R. R. v. Bond*[19] the court on appeal ordered a remittitur of $2,500 from a verdict of $10,000 awarded plaintiff whose intestate was struck and killed by an engine of defendant. One of the asserted reasons for the order was the apparent failure of the jury to take into consideration the negligence of the intestate. However, as is typical in cases of this type, the damages awarded appeared to be grossly excessive irrespective of any fault on the part of intestate, and the liability of defendant, predicated solely on the speed statute and supported by highly conflicting testimony, was open to serious doubt. In the case of *Reid v. Halpin*[20] plaintiff, who was injured when struck by a speeding automobile, was at the time acting in violation of an ordinance requiring motorists to stop at designated intersections. An issue of comparative negligence was held properly submitted to the jury.

An effort to utilize the Comparative Negligence Statute in a novel situation was made in the case of *Weaver v. Grenada Bank.*[21] Plaintiff's account was subjected to several overdrafts by reason of the negligence of defendant bank in misinterpreting the face of an earlier check of plaintiff. Action was instituted for alleged damage to the latter's credit. A verdict of nominal damages was supported by defendant on motion for a new trial on the ground that the negligence of plaintiff in drawing the check in ambigous form substantially contributed to the error. Although the theory of plaintiff's suit cannot clearly be gathered from the reported decision, he might have proceeded on the theory of defamation, negligence, or breach of contract between bank and depositor. In

[18]Crosby Lbr. & Mfg. Co. v. Durham, 179 So. 285 (Miss. 1938).
[19]179 So. 355 (Miss. 1938).
[20]178 So. 88 (Miss. 1938).
[21]180 Miss. 876, 178 So. 105 (1938); *aff'd. on rehearing*, 179 So. 564 (1938).

rejecting the defense of comparative negligence the court stated that plaintiff's action was for breach of contract. The same result might have been reached had the court chosen the idea of defamation as the basis of recovery.

D. Emotional Disturbance and Mental Suffering

On many occasions the Supreme Court of Mississippi has announced allegiance to the traditional common law rule that recovery will not be allowed for emotional disturbance unaccompanied by a physical injury or some independent actionable wrong. However, the court has shared the prevalent juristic antipathy toward the rule and on many occasions has sought to avoid its application. When emotional disturbance is caused by insulting language and the defendant is a private individual little difficulty is encountered in enforcing liability. The Actionable Words Statute[22] (sometimes termed the Anti-duelling Act) permits direct recovery. However, the court has held that the statute has no application in a suit against a corporate defendant for the insulting language of its agent,[23] although other courts under similar statutes have refused to distinguish between corporations and individuals as defendants.[24] In the recent case the *Saenger Theatres Corporation v. Herndon*[25] plaintiff, a young girl, was excluded from defendant's theatre by the doorman who used unnecessary and abusive language. There appears to have been some slight physical illness following the shock, and a verdict of $1,000 was sustained on appeal. In answer to defendant's contention that damages are not allowable or emotional disturbance or its physical consequences unless the case is properly brought under the Actionable Words Statute or some independent physical wrong can be found, the court replied:

> ". . . . This rule does not include cases of wanton or shamefully gross wrong such as the case now before us . . . ."

Several features distinguish this case from the usual complaint of emotional disturbance. Plaintiff had purchased her ticket and was legally entitled to admission to defendant's premises. Although defendant is allowed the privilege of revoking the license in the interest of peace and order, yet this privilege must be exercised in a reasonable manner and not through violence or abuse. The decision is illustrative of a tendency prevalent throughout the nation, that those who solicit the public's business owe a

[22]Miss. Code Ann. (1930) § 11.
[23]Dixie Fire Ins. Co. v. Betty, 101 Miss. 880, 58 So. 705 (1912).
[24]W. T. Grant Co. v. Owens, 149 Va. 906, 141 S. E. 860 (1928).
[25]180 Miss. 791, 178 So. 86 (1938).

legally enforceable duty to female patrons to extend them courteous treatment, not violent language and abuse. The tendency is most marked in suits against public carriers and keepers of public inns.[26]

E. Liability of Master for Injuries to Servant

The development of this branch of the law of tort has been marked by a slow but constant breakdown of the old rules which immunize the master from liability for injuries to the servant. Evidences are found in the statutory abolition of the doctrine of assumption of risk and the Comparative Negligence Statute. It is not unreasonable to believe that the judicial and legislative attitude has been greatly influenced by the presence of Workmen's Compensation Laws in practically every other jurisdiction in the nation. More recently we find a conspicuous enlargement of the concept of duty to provide a reasonably safe place to work, which now encroaches materially on the traditional boundaries of the fellow-servant doctrine. Conflict of the opposed ideas underlying the two doctrines has been apparent in the Mississippi decisions for several years. The ascendancy of a right (somewhat dubiously bounded) in the servant to demand of the master protection against many of the perils of a fellow servant's carelessness is becoming increasingly obvious. This right is most conspicuously protected today through enforcement of the recognized duty of the master to provide the servant a safe place to work. When the danger to the servant from carelessness of his co-worker could be minimized by the formulation of rules or the creation of a "system" by the master, the latter will be held liable for failure to inaugurate or administer such system. The administration of this task is treated as a non-delegable duty. Hence the master is rendered liable under the principle of *respondeat superior* for much of the negligence of one employee toward another. It need not be shown by the employee that the result of proper operation of the system would be to obviate the peril; it is enough that the danger would be minimized. These ideas are prominent in the recent cases: *Albert v. Doullut & Ewin et al*,[27] *Scott-Burr Stores Co. v. Morrow*,[28] and *Adams v. Hicks*.[29] In all three cases the master was held liable for the negligence of fellow servants or strangers under the imposed duty of providing a reasonably safe place of work for the servant. However, the fellow-servant rule still obtains in many situations where a supervisory duty of the

[26]Harper and McNeely, *A Re-Examination of the Basis for Liability for Emotional Distress* (1938) Wis. L. R. 426, 436-439.
[27]180 Miss. 626, 178 So. 312 (1938).
[28]180 So. 741 (Miss. 1938).
[29]178 So. 484 (Miss. 1938).

master cannot be imposed successfully. Thus, in *Weaver & Co. v. Harding*[30] a servant was denied recovery when injured through the negligence of a co-worker who was driving him home from work in the company truck.

Further examples of the enlarged duty to provide the servant a reasonably safe place to work are furnished in the cases: *Stricklin v. Harvey*[31] and *Graham v. Brummett.*[32] Even though a reasonably safe approach to and from the servant's spot of labor is provided, the master may nevertheless be held liable where the servant uses another and unauthorized approach which the master knows is customarily employed by his servants. Such a duty would prove financially disastrous to the employer if carried to its logical extreme. However it is noteworthy that in the two cases above, the defect causing injury could have been remedied with little or no difficulty, or at least the maintenance of the dangerous condition served no useful purpose in the employer's business.

The duty of the master to provide a safe place to work is not an absolute one. He is obliged only to make such financial outlay for the protection of his employees as sound business policy will allow. Despite the abolition of assumption of risk and the prevalence of comparative negligence, the court will not impose on the employer the duty of providing instruments of labor or a place to work which are completely fool-proof. This policy was reiterated in a recent Mississippi decision:

> ". . . . when the particular way or appliance is one which may be used with reasonable safety by an employee who is using the same in the usual, ordinary, or normal manner for which the use was designed or intended, then the employer has complied with its legal obligations in that respect, even though a better or safer appliance or way might have been furnished . . . . an employer is not bound to provide means and appliances of such character that no possible injury could occur in the use thereof, and this regardless of the manner of use by the employee."[33]

In the above case, clearance provided between defendant's tracks and an adjoining cattle guard was the same as usually exists on defendant's line. Plaintiff was injured when his body, protruding in an unnatural position from the box car on which he was hanging, was struck by the cattle guard. Defendant demonstrated that

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[30]180 So. 825 (Miss. 1938).
[31]179 So. 345 (Miss. 1938).
[32]181 So. 721 (Miss. 1938).
[33]Favre v. L. & N. R. R., 180 Miss. 843, 859, 178 So. 327, 329 (1938).

a further clearance of eight or ten inches would not have prevented the accident. A peremptory instruction for defendant was affirmed on appeal. Similar reasoning resulted in judgment for the employer in *Wilson & Co. v. Holmes*.[34] In *Crosby Lumber & Mfg. Co. v. Durham*[35] the court held that the duty to provide reasonably safe appliances for the employee's work included the obligation to supply safe tires. The employee was allowed to recover when injured by reason of his car's overturning as the result of a blowout. Knowledge by the employee of the defective condition of the tire was held not to preclude his right to recover.

Although a servant who chooses to over-exert himself unnecessarily in his labor cannot recover for damages flowing therefrom, nevertheless the master is under a duty to provide sufficient labor and machinery for the task at hand, and if he fails to do so and directs the employee to perform a physical task which reasonably might result in injury, he will be held for the resulting damage. This was the conclusion of the court in *Hardaway Contracting Co. v. Rivers*.[36] The court declared that although a man is the best judge of his own strength, yet he is not the best judge of the strength of his fellow employees who are engaged to assist him. This judgment is entrusted to his employer.

The rights peculiar to young and inexperienced employees came to the fore in two recent decisions. In *J. W. Sanders Cotton Mill v. Bryan*[37] breach of the well-recognized duty to instruct employees resulted in judgment against the employer. In view of the great perils of complicated industrial machinery the duty to instruct servants in safe methods of operation is an imperative one. The court held that this duty is not discharged when the master "does his best" to make the employees understand. The servant must be made actually to understand and appreciate the danger or he should not be assigned to the job. Thus the master is virtually an insurer of the success of his efforts to instruct. Particular caution is required where the employee is a minor, said the court. Although a minor may have quick perceptions and a good memory, his capacity to reason and judge of situations may be undeveloped and inferior. In *Middleton v. Faulkner*[38] a modification of the simple tool doctrine was effected by the court in favor of a young and inexperienced employee. A steel splinter from a defective wedge flew into plaintiff's eye and inflicted serious injury. Plaintiff was allowed to recover although he was aware of the danger-

[34]180 Miss. 361, 177 So. 24 (1937).
[35]179 So. 285 (Miss. 1938).
[36]180 So. 800 (Miss. 1938).
[37]179 So. 741 (Miss. 1938).
[38]180 Miss. 737, 178 So. 583 (1938).

ous condition of the tool. The court declared that although a master is not ordinarily liable in regard to simple tools, either as to their condition as supplied or as to their repair, yet beyond this the rule could not be pressed. The law takes notice and requires employers to take notice than an employee who is of far less years than that which presupposes maturity and stamina of independent judgment, and who is without the experience which would compensate for the want of age, is not capable of the reflective and reasoning power, the distinct and deliberate full realization of danger, and the full exercise of his own judgment as is expected of a grown man, and in such cases, and to the extent which is just and reasonable, employers must govern themselves accordingly.

It appears to the writer that continued loyalty to the so-called simple tool doctrine is difficult to justify in view of the abolition of the doctrine of assumption of risk. The employer who furnishes his employees with simple tools which, because of defective construction or poor repair, involve a known and unreasonable risk of injury to the user, should be liable therefor just as he is held under a duty to provide reasonably safe machinery and place to work. The only apparent distinction between the simple tool and its more complicated brother lies in the fact that the defects of simple devices are generally more readily appreciated by the user and more easily repaired by the employee than are the dangers of complex industrial machines. It would appear that the ordinary formula of negligence would permit a fair and detailed consideration of the merits of each factual situation and that a special restrictive doctrine relative to the simple tool serves no useful purpose, but rather fosters injustice.

F. Motor Vehicles

In *Wheat v. Teche Lines*[39] defendant's bus was driven over a section of the highway which was under repair and covered with large quantities of loose slag and gravel. Quantities of gravel were thrown by the wheels and struck plaintiff in the eye. A peremptory instruction for defendant was held error. Whether or not the speed of the bus, which was from forty to fifty miles per hour, and the failure of the driver to keep to the right constituted actionable negligence was a proper question for the jury's consideration. Questions involving the effect of violation of traffic ordinances on civil liability were considered in *Reid v. Halpin*[40] and *Whatley v. Boolas*.[41]

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[39]179 So. 553 (Miss. 1938).
[40]178 So. 88 (Miss. 1938).
[41]180 Miss. 372, 177 So. 1 (1937).

G. Carriers of Freight

The ordinary common law liability of a freight carrier is that of an insurer. Although he is excused if the goods are destroyed by an act of God or the public enemy, still it is incumbent on the carrier to show, not only that an act of God proximately caused the injury but likewise that the carrier was guilty of no negligence which contributed to the injury. Under the *Carmack Amendment*, however, the rule as to interstate carriers is somewhat modified. When a carrier shows that a loss was occasioned by some *vis major*, he is excused without affirmatively showing that he was guilty of no contributing negligence. The proof of the carrier's negligent participation in the accident rests on the shoulders of plaintiff. In accordance with this Federal rule the Supreme Court of Mississippi held in a recent case[42] that proof of destruction of freight in the yards of defendant railway by an unprecedented flood, supported only by evidence that the injury would have been avoided had the car been placed on a higher track, was not sufficient evidence of liability to warrant submission of the case to the jury.

In the case of *Southeastern Express Co. v. Namie*[43] plaintiff sought to recover for damage to a quantity of skunk pelts which were damaged in shipment. He alleged and attempted to establish negligence of the carrier in placing the pelts too near pipes with escaping steam. Defendant's motion for a directed verdict was held properly overruled. Even though the shipper is unable to establish negligence, he may proceed on the basis of the absolute nature of carriers' liability. An unsuccessful attempt to prove more than required of him will not defeat his cause.

H. Duty of Owners and Occupiers of Land

The liability of a landlord of a building for injuries to persons outside the premises by reason of defective conditions was recently considered by the court in *Evans v. Hill*.[44] Plaintiff, a passerby, was struck by a piece of falling timber which proved to be a portion of a window sill. The landlord had previously leased the premises without covenant to repair. Judgment for plaintiff was reversed. The landlord could not be held unless it were shown that the defect existed at the time of the making of the lease and was either known to the landlord or discoverable by reasonable inspection.

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[42]Baltimore & O. R. Co. v. Johl & Bergman, 180 Miss. 593, 177 So. 778 (1938).

[43]181 So. 515 (Miss. 1938).

[44]181 So. 847 (Miss. 1938).

In *McDonald v. Wilmut Gas & Oil Co.*[45] plaintiff secured permission from the occupier of land to pasture cattle thereon. Defendant had previously been granted a license to run its pipe line across the same premises. That section of the pipe line ditch which ran through a swampy and useless portion of the land was left open. This was obvious and well-known to plaintiff when he accepted the permission. For this reason the court held that he could not recover for the loss of an ox which fell into the open ditch. It was immaterial whether plaintiff was treated as a subtenant, gratuitous licensee or a licensee for a valuable consideration, said the court. In either event the licensor owed no duty to remedy dangerous conditions of which the plaintiff was aware. Apparently the court assumes that the defendant, who is also a licensee, is entitled to all the immunities of his licensor, even though the defendant was acting solely on his own behalf. Although the conclusion in the instant case is doubtless fair and just, yet the court evaded the real question: the duty of licensees to each other.

I. Liability of Repairman of an Automobile

Not infrequently decisions arise involving the liability of a repairman or mechanic to the owner of a car for defects created in the process of repair which later result in personal injury to the owner. Such cases are usually submitted to the jury under the usual rule of ordinary skill and care. But suppose injury is sustained by a third person, such as a pedestrian or social guest? The problem is more difficult, due to the fact that plaintiff is not a party to the contract of repair. Somewhat similar is the situation where an ultimate purchaser of an automobile is injured in an accident brought about by careless manufacture. It has been held in Mississippi and several other jurisdictions that such purchaser cannot recover unless he can demonstrate that the manufacturer was aware of the defect and failed to remedy it.[46] Failure to inspect and general carelessness are not sufficient ground for liability.

In the case of *Burkett v. Globe Indemnity Co.*[47] plaintiff alleged that one *R* took a car to defendant for repairs to the steering wheel, and that defendant knowingly left a wrench in the steering mechanism and concealed this fact from *R*. Later the car was wrecked when the steering machinery became inoperative due to the fact that the wrench locked with other parts of the device.

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[45]180 Miss. 350, 176 So. 395 (1937).
[46]Ford Motor Co. v. Myers, 151 Miss. 73, 117 So. 362 (1928).
[47]181 So. 316 (Miss. 1938).

Plaintiff further alleged that he was *R's* social guest at the time and suffered serious personal injuries. A demurrer to the declaration was sustained in the lower court. This was held error on appeal. If defendant *knowingly* left the wrench in the machinery and concealed this fact from the owner, he becomes liable to any person injured because of the dangerous condition created. To the writer it is inconceivable that plaintiff seriously expects to prove that the repairman left the wrench in the car with full knowledge that it was there, or that the court can anticipate that any such evidence will be forthcoming. The case appears to be one involving carelessness and forgetfulness in the course of the repair (i.e. simple negligence). Is it possible that the court is prepared to allow recovery on the fiction of constructive or implied knowledge growing out of "gross negligence"? If so, it would be more direct and less confusing to adopt the fast-growing doctrine of *McPherson v. Buick Automobile Co.*[48] which bases liability in such cases on negligence alone. The writer of course appreciates the fact that the allegations in the declaration must be taken as true for purposes of demurrer.

J. Defamation

A bank which negligently dishonored several checks drawn on plaintiff's account was recently held liable for injury to the reputation of plaintiff's credit caused thereby.[49] The court further held that plaintiff was entitled to more than nominal damages despite the fact that he had later informed the bank that he was not injured. The court held that the action was brought for breach of the contract of deposit between plaintiff and defendant. However, it has been held in several jurisdictions that such an act constitutes an independent actionable tort (probably defamation since the plaintiff need show no special damage).

In the case of *Missouri Pacific Transp. Co. v. Beard*[50] defendant and three other bus companies operated a common terminal in Natchez. Defendant, after careful investigation and relying on its official audit, notified the other participating companies that plaintiff, general manager of the terminal, was short in his accounts, and that defendant would be forced to withdraw from the terminal unless a new manager were selected. The statement was held to be privileged and not to subject defendant to liability unless actuated by malice.

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[48]217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696 (1916).

[49]Weaver v. Grenada Bank, 180 Miss. 876, 178 So. 105 (1938); *aff'd. on rehearing* 179 So. 564 (1938).

[50]179 Miss. 764, 176 So. 156 (1937).

> "The term, 'malice' as used in this connection, relates to the state or condition of mind of the person who speaks or writes the defamatory words, and means that the person who writes or speaks is actuated by ill will, spite or hatred, or else that he spoke or wrote with a wanton and reckless disregard of whether the words were true or not. . . ."[51]

In *Scott-Burr Stores Corp. v. Edgar*[52] defendant's manager accused plaintiff of stealing razor blades. The accusation was made in comparative privacy, behind the lunch counter in the store. However, there was some evidence that the statement was made within hearing distance of several of defendant's saleswomen. The court proceeded on the idea that the accusation uttered to plaintiff amounted to publication of a defamation, but was privileged since both plaintiff and defendant had a mutual interest in the investigation. Of course every person has an *interest* in any statement accusing him of crime, but it is a strange twist of reasoning that allows this interest to give the defendant a privilege to make the accusation. A simpler and more direct disposition of this feature of the case could have been made by reference to the elementary rule that a defamatory statement is not published unless uttered to a third person. Considering the saleswomen who overheard the remarks, the court said:

> ". . . . the fact that the alleged slanderous words may have been uttered in the presence and hearing of other persons who were accidentally present and to whom the remarks were not addressed, would not overthrow the qualifiedly privileged nature of the communication."[53]

The conclusion of no liability is eminently correct, since the saleswomen were all fully aware of the fact that plaintiff was under suspicion before the managers remarks were uttered. Furthermore, the statement was made in as private a place as the circumstances would permit. It is highly doubtful that the accusation injured plaintiff's reputation, although it may have affected his sensibilities. However, the technical approach of the court to the problem is open to some criticism. A better solution would have been a holding that if the words were uttered only to plaintiff and with caution as reasonable as the circumstances would permit to prevent disinterested parties from overhearing the remarks, there is no publication. It is submitted that no real problem of privilege

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[51]179 Miss. 764, 788, 176 So. 156, 159 (1937).
[52]177 So. 766 (Miss. 1938).
[53]*Ibid.* at 770.

was presented.[54] The statements used by the court indicate a confusion of actionable and insulting language with defamatory statements.

In *Reliance Mfg. Co. v. Graham*[55] defendant's manager accused an employee of theft in the presence of several other employees. Here publication is clear, and privilege was the only defense available to defendant. The court admitted the statement was qualifiedly privileged, but declared that the privilege was exceeded through malice. The defendant could serve no valid interest by making the accusation in the presence of totally disinterested parties when privacy was available. Furthermore he admitted that the statement attributed to him was untrue, and denied the utterance.

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[54]RESTATEMENT, TORTS (Tent. Draft No. 12) § 1020, Comment o (1935).
[55]179 So. 341 (Miss. 1938).

MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR

VOL. XI. SEPTEMBER, 1938 No. 1

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Editorial Notes

This Issue. This issue of the Mississippi Law Journal differs in many respects from former issues. In the first place, it is devoted solely and exclusively to subjects of peculiar interest to Mississippi lawyers. In the second place, it does not follow the usual division of form of leading articles, student notes and case comments. Instead, it divides the subject matter into a number of departments which had not previously appeared. It is the intention of the Journal that the first issue of each volume in the future shall follow the form suggested by the present number. Lack of sufficient time since it became apparent that an extra issue might be included in each volume has prevented the staff from causing this issue to conform to the plan which had been prepared; but it is hoped that in the future the following departments will become permanent ones for the first number in each volume:

(1) Work of the Mississippi Supreme Court for the preceding year. An inspection of pages 1 to 76 above will show what is intended. This department was suggested as a result of the success of other legal periodicals (notably the *Wisconsin Law Review*) in similar work for a number of years.

(2) Work of the Mississippi Legislature for the preceding year. This department, of course, would be included only during the years in which the Legislature had held a session. (Definite plans had been made for the inclusion of this department in this issue, but just as the material was going to press the attorney who had undertaken to prepare it notified us that he would be unable to supply it).

(3) Work of Administrative Tribunals and Bureaus during the preceding year. This department will summarize the rulings and other activities of the Attorney General and any other administrative departments in which attorneys are usually interested.

(4) Mississippi Leading Cases. Separate articles will be devoted to certain cases which are entitled to be known as leading cases. The case discussed in this issue is *Clayton v. Clark.*

(5) Unique Cases in Mississippi. Articles here would discuss such cases as *Bradley v. State,* the famous wife-beating case.

(6) Historical articles. An article for this issue entitled "Lands of the Liquidating Levee Board" had to be omitted because of the size of this issue.

(7) Biographical Sketches. Judge Whitfield and J. H. Currie are the subjects of the sketches in this issue.

Any suggestions for improvements of this plan will be carefully considered and greatly appreciated.

NEWS OF THE SCHOOL: Attendance in the Law School continued to increase during the past year. One hundred twenty-five students were enrolled, making the school one of the largest in the South from the standpoint of attendance. Continued growth is confidently anticipated. Professor John H. Fox has returned from leave of absence granted last year, during which time he was engaged in graduate work at Yale Law School. His place on the faculty was filled during his absence by Charles S. Tindall, Jr. The vacancy on the faculty of the Law School created by the death of Professor William Hemingway was filled by Professor William G. Roberds.

Several changes have been effected in the curriculum of the School of Law. These have consisted notably in the addition of new courses to be offered. Courses now available include *Legislation* (two courses, elementary and advanced), *Administrative Law, Property Taxation, Income Taxation, Conveyancing and Abstracting,* and *Future Interests.* Substantial changes are being effected in the course in *Public Utilities,* and an advanced course in *Torts* is now offered third year students.

The School of Law continues to take an increasingly prominent part in the activities of the *Association of American Law Schools.* Dean Thos. C. Kimbrough serves as Chairman of the Committee entrusted with the work of the newly-created Round Table on Special Problems of the Smaller Schools.

MISSISSIPPI LEADING CASES

CLAYTON *v.* CLARK

*John H. Fox, Jr.**

When Thomas H. Woods, former Chief Justice of the Mississippi Supreme Court, went bear hunting, he disdainfully lifted his legal nose and refused to be swerved from his quarry by any mere dead herrings dragged across his trail. And in *Clayton v. Clark*,[1] Judge Woods was out for bear—an old bear that had been troubling the legal countryside for 295 years. And after reading Judge Woods' account of the chase after it was all over, one could very obviously tell that this bear's presence had been sticking in his craw ever since he had first struck its trail as a mere stripling of a legal nimrod.

Bruin was known to legal historians as "Lord Coke's Dictum" in *Pinnel's Case*,[2] decided in England in 1602 and as a cub did very little damage to the legal happy hunting grounds; for, as pointed out by Judge Woods, *Pinnel's Case* turned upon a mere point of pleading. The simple facts were that Pinnel sued Cole upon a debt of some eight pounds. Cole pleaded that *before the day* of maturity he *paid* Pinnel some five pounds and that Pinnel *accepted* the five pounds in full satisfaction of the eight. This was everywhere a good defense. But Cole's lawyer was a poor pleader, and since he merely pleaded that Pinnel *accepted* the lesser sum in full satisfaction and did not plead that he *paid* Pinnel the lesser sum in full satisfaction, therefore (to quote Judge Woods), "he lost, unhappy wretch that he was, born two or three centuries too soon, and not knowing the difference betwixt legal tweedle-dum and legal tweedle-dee, because he pleaded that he *paid* a part of the greater original sum, and that the plaintiff *accepted* it in full satisfaction, and did not plead that he *paid* it in full satisfaction." (Emphasis mine).

But Bruin grew and later waxed strong and became chiefly infamous because of "Lork Coke's Dictum" therein expressed, in language not necessary to the decision, that "payment of a lesser sum *on* the day in satisfaction of a greater cannot be any satisfaction for the whole because . . . . by no possibility, a lesser sum can be a satisfaction to the plaintiff for the greater sum; but the gift of a horse, hawk or robe, &., in satisfaction is good . . . . When

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*Professor of Law, Univ. of Miss. School of Law.

[1]74 Miss. 499, 21 So. 565, 22 So. 189 (1897).

[2]5 Co. 117a (1602). See Hemingway, *The Rule in Pinnel's Case* (1927) 13 VA. L. REV. 380, (1928) 1 MISS. L. J. 179.

the whole *sum is due,* by no intendment the acceptance of parcel can be a satisfaction to the plaintiff."

This was said to be true because of the fact that the promise to discharge the balance of the debt was without consideration, since the only thing the debtor had done was to pay a part of his debt—an act which he was already under a pre-existing legal duty to do, and hence was no consideration at all. Of course if he paid *before the day,* that was something he was under no duty to do and furnished the "necessary" consideration. This dictum then, with age, with the weight of Coke's authority, and with the later support of such cases as *Foakes v. Beer*[3] and innumerable others in its wake, became one of the most firmly intrenched "fundamental principles" of the law, although in every case that followed it, there was much growling and snarling at its unjustness and ridiculousness. In 1891, just six years before *Clayton v. Clark,* the New York Court of Appeals said, "This simple question has since arisen in the English courts and in the courts of this country, in almost numberless instances, and has received the same solution, notwithstanding the courts, while so ruling, have rarely failed upon any recurrence of the question, to criticise and condemn its reasonable justice, fairness or honesty. *No respectable authority* that I have been able to find, has, after such unanimous disapproval by all the courts, held otherwise than was held in *Pinnel's Case* . . . . in spite of the current of condemnation by the individual judges of the court, and in the face of the demands and conveniences of a much greater business and more extensive mercantile dealings and operations."[4] (Emphasis mine).

Sir George Jessel, in poking the stick of ridicule at Bruin, said, "According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tom-tit if he chose, and that was accord and satisfaction; but, by a most extraordinary pecularity of the English Common Law he could not take nineteen shillings and sixpence in the pound; that was *nudum pactum.*" (And with reference to compositions with creditors, he continued) "Therefore it was necessary to bind the creditors; and as every debtor had not a stock of canary birds or tom-tits, or rubbish of that kind, to add to his dividend, it was felt desirable to bind the creditors in a *sensible* way by saying that, if they all agreed, there should be a consideration *imported* from the agreement constituting an addition to the dividend, so as to make the agreement no

[3]9 App. Cas. 605 (1884).

[4]Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351 (1891).

longer *nudum pactum,* but an agreement made for valuable consideration; then there would be satisfaction."[5] (Emphasis mine).

In *Foakes v. Beer, supra,* Lord Blackburn growlingly followed Bruin, but said, "What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so."

It was then in this unpenetrated forest of *stare decisis* that Bruin had been, for nearly three centuries, allowed to perpetrate unmolested, his unfairness, his injustice and his dishonesty, while "respectable courts" merely "passed by on the other side" and skirted the forest with such handy dodges and excuses as they could muster. For instance, the part payment of the greater sum was said to completely discharge the debt if any part was paid before the date of maturity;[6] if the part payment was made by a third party;[7] if the debtor gave a negotiable note for the part payment[8] and thereby merely promised to pay in writing instead of simply paying out the cash; if it were a composition with creditors;[9] and last, but not less ridiculous, if the part payment after maturity was made at a place *different* from that in which the debtor was *bound* to pay[10]—and this in the face of the fact that most of us thought that after maturity a debtor was *bound* to pay at *any place* in which he could be caught.

It was in this last mentioned dodge that Bruin had first laired within the jurisdiction of the State of Mississippi and in *Jones v. Perkins*[11] it was said, "It is true that an agreement to accept a less sum, or the actual acceptance at the place of payment, by the terms of the original contract, of a less sum than the amount due, is no defense to the debtor. It is, however, said that this rule is entirely *technical* and not very well supported by reasons . . . .

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[5]Couldery v. Bartrum, 19 Ch. Div. 394 (1881).

[6]Phillips v. Preston, 5 How. 278 (U. S. 1847); cases collected in 1 WILLISTON, CONTRACTS (2d ed. 1936) § 121.

[7]Grant v. Porter, 63 N. H. 229 (1884).

[8]Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351 (1891).

[9]White v. Kuntz, 107 N. Y. 518, 14 N. E. 423 (1887); Couldery v. Bartrum (1881) 19 Ch. Div. 394.

[10]Sonneberg v. Riddel, 16 Minn. 83 (1870); Harper v. Graham, 20 Ohio 106 (1851); Cavaness v. Ross, 33 Ark. 572 (1878).

[11]29 Miss. 139 (1855).

While the general rule is as above stated . . . . yet if such payment is made, or to be made at a place different from that appointed by the contract, this is sufficient consideration . . . . The debtor . . . , was not required to go out of the state to make payment." (Emphasis mine).

Again in *Pulliam v. Taylor*[12] the court had said, "There is no sound rational distinction between the acceptance of an article of property, worth just half the amount of the debt . . . . and the acceptance of half the amount of the debt in money. Yet all the authorities agree that the former would be a good accord and satisfaction, and the latter would not. Because this distinction has no solid foundation, and seems to be without good reason, *resting at this date exclusively upon authority*, the courts of late years have been astute to withdraw from its application all those cases where there was any new consideration or *benefit that might inure to the creditor*, although it might fall far short of the original debt. It may be difficult to yield assent to the proposition that if the debtor pays in *money*, and the creditor takes in payment and discharge of his debt one half, it is no satisfaction; yet he may take the *bond* or *promissory* note of the debtor with surety, or the note of a third party for half the amount, and that will be a good accord and satisfaction." (Emphasis mine). After holding that this was the state of the law, the court added these *double* meaning words, "In the exigencies of business, it may be a very prudent arrangement, for a creditor to *secure* part of his debt when the whole is in danger of loss." The emphasis on the word *secure* was by the court, and if it was thereby "*to take security*" for the part, it is easy to agree with the court that this would be a "benefit inuring to the creditor," but *a fortiori* it is submitted that if the word "*secure*" was used in the sense of *actually getting* the part by payment, then this would seem to be more of a benefit inuring to the creditor than a mere secured promise that he would get it. Echoing the words of Lord Blackburn in *Folkes v. Beer, supra*, it would seem to be equally as "prudent an arrangement" to actually get the part payment as it would be to take security for it; certainly when the whole is in danger of loss.

In *Burros v. Gordon*[13] there was apparently a reversion to the "tweedle-dum and tweedle-dee" pleading of Lord Coke in 1602, the court saying, "As a plea of payment it is bad, because it sets up a payment of $76.80 in full satisfaction of a demand for $500. As a plea of accord and satisfaction it is bad, because it fails to state

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[12]50 Miss. 251, 258 (1874).
[13]57 Miss. 93, 95 (1879).

any actual accord between the parties that the sum paid should be accepted in full satisfaction of the plaintiff's larger demand."[14]

Although even prior to *Clayton v. Clark*, Bruin's position in Mississippi may be said to have been precarious, resting, as was said by the Mississippi Supreme Court, "exclusively upon authority, and without reason or solid foundation," nevertheless, it is definitely known from the foregoing Mississippi cases, that at least on these three occasions he had laired within our confines. And it was from thence that Judge Woods struck the trail, riding *Clayton v. Clark* as an excuse, going unnecessarily out of his way, snorting at two dead herring trails, fighting *dictum* with *dictum* and in language unnecessary to the decision of his case, laid old Lord Coke's Dictum low, and overruled, in Mississippi, anything and everything that might previously have been construed as having been said in its favor.

Now the facts in *Clayton v. Clark* were again simple, although in one important particular somewhat obscured by faulty reporting. R. C. and R. B. Clark owed one Andrew Haley $2789 evidenced by their promissory note due Aug. 1, 1893. The Clarks, in full satisfaction of the entire debt, paid $1000 to Haley, who at the time accepted it in full satisfaction and surrendered to them the note evidencing the debt. Thereafter Haley began the action for the balance; but after the action was commenced, Haley died and with him his chance to fame, as the action was continued in the name of his administrator, Clayton.

We shall probably never know whether this part payment was made *before* or *after* maturity, nor shall we ever know what the declaration or the pleas alleged with reference to the time of this payment in relation to maturity. The official Mississippi Reports statement of facts is silent as to the allegations of the declaration in this respect, while the unofficial Southern Reporter states, "The declaration states . . . . that there had been only $1000 paid on the note, which was paid *after maturity* (emphasis mine) by R. C. Clark." Again the official Mississippi Reports statement of facts with reference to the pleas, states that "it was averred that *about* (emphasis mine) the time of maturity of the note, the payee transferred and assigned the same to R. C. Clark"; while the unofficial Southern Reporter says, "Three pleas were interposed . . . . First, *on* July 30, 1894 plaintiff assigned . . . . second, that *on* July 30,

[14]In this case the "$500" demand was entirely unliquidated, being a $500 demand for failure to deliver two hundred pounds of cotton, the failure to leave the cotton seed on the leased premises, and the neglect to clear six acres of land and to repair fences.

1894 plaintiff sold and delivered . . . . and third, that *on* July 30, 1894 in consideration of $1000 *then and there* in cash paid plaintiff by the said Clark, the plaintiff assigned in writing to said Clark and delivered to him said note." (Emphasis mine). Judge Woods himself adds to the mystery by stating in one place in his opinion that "The pleas do not aver with sufficient distinctness any payment *before* the day of maturity. They only aver that *about* July 30 payment was made." And again he says, "the pleas only answered that *about two days before* the day of the note's maturity . . . . payment was made." (Emphasis mine). Unfortunately the mystery could not be solved by the writer, for after a thorough search of the records on appeal on file in the Supreme Court Clerk's office, this important record could not be found.

But all this was mere matter of immateriality to Judge Woods. If payment was *before* the day, even Lord Coke had known that this was a good defense. "Before the day" was not the trail of Bruin, but a mere dead herring issue. "Lord Coke's Dictum" had said that payment *after the day* was no defense. And so to avoid this issue, Judge Woods merely says that payment *about two days before maturity* is the same thing as saying *about two days after maturity—about* a certain time may mean a day, or a week or a month *after* the time as well as a day, or a week or a month before the time. (No mention is made of the statement contained in the Southern Reporter that the pleas stated payment to have been made *on* July 30 (which was *before* maturity). "The plea is to be taken most strongly against the pleader." And thus was Clark's payment made to conform to the payment in Lord Coke's Dictum—after the day.

There was another trail that Judge Woods could have taken in giving relief to Clark, but it too was too well known to occupy his time—another mere dead herring that could be very well ignored and left; as in fact it was left, to be taken care of in a mere specially concurring opinion by Judge Whitfield. It had everywhere been held that where a negotiable *promissory note* was surrendered to the maker, *at or after maturity* either in exchange for a part payment which is accepted in full satisfaction,[15] as was the case in *Clayton v. Clark*, or as a mere gift,[16] that the instrument was thereby discharged. This principle of the old Law Merchant has been

[15]Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168 (1892).

[16]Larkin v. Hardenbrook, 90 N. Y. 333 (1882); Sherman v. Sherman, 3 Ind. 337 (1852). This principle had been recognized in Mississippi at least by implication for years, although Judge Whitfield is in error in stating that Young v. Power, 41 Miss. 197 (1866) "expressly so holds" and the quotation therefrom contained in his concurring opinion cannot be found in that opinion.

since codified in Sections 119 and 122 of the Negotiable Instruments Law[17] where it is said, "A negotiable instrument is discharged . . . . (5) when the principle debtor becomes the holder of the instrument *at* or *after* maturity in his own right" and "The holder may expressly renounce his rights against any party to the instrument, *before, at or after* its maturity . . . . A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." Judge Whitfield, in placing his concurring decision on this ground, sums up with this flattering tribute to Judge Woods, "And while not desiring to be understood as dissenting from the vigorous and splendid *reasoning* of my brother, Woods, I simply prefer to rest the decision of *this* case upon its *proper facts*." (Emphasis mine).

But Judge Woods was not to be swerved. Jumping one, and ignoring the other of these two perfectly possible solutions to *Clayton v. Clark*, he placed his opinion squarely in opposition to *"Pinnels Case*, that mischievous and misleadingly reported case," containing as he expressed it, "a hoary dictum, which after the lapse of more than a century had by some of the English courts been thought to have ripened into authority." He then continued, "However it may have seemed 300 years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day, and in this country, where almost every man is in some way or other engaged in trade or commerce, it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost and delay, or the hazards of litigation in an effort to collect all, is not often—nay generally—greatly to the benefit of the creditor." Taking the view that *no respectable court* would follow a precedent which was "unfair, unjust or dishonest," he says, "Such a rule of law is absurd, irrational, unsupported by reason, and not founded in authority, as has been declared by courts of the highest respectability and of last resort, even when yielding reluctant assent to it. *We decline to adopt or to follow it*, and if there is anything in the case of *Jones v. Perkins* . . . . or *Pulliam v. Taylor* which may be regarded as sanctioning the rule . . . . then to that extent those cases are hereby overruled; and the case of *Burrus v. Gordon*, in so far as it sanctions the rule we are *combatting*, is hereby overruled." (Emphasis mine).

Thus the Mississippi Supreme Court became the first court for 300 years to put an end to Bruin's career, and the effect has been

[17]Miss. Code Ann. (1930) §§ 2775, 2778.

widespread. The New Hampshire Court,[18] followed, quoted fully and gave entire approval to *Clayton v. Clark*, while the Arkansas court merely added the requirement that the debtor should get a receipt for the balance,[19] as do the courts of Michigan,[20] Wisconsin,[21] Connecticut, [22] Idaho,[23] and Iowa.[24] In a dozen states, including Alabama, California, Georgia, Maine, Montana, North Dakota, Oregon, South Dakota, Tennessee and Virginia, statutes have been passed[25] reaching practically the same result as in *Clayton v. Clark*, while even in New York, where the former view as shown in *Jaffray v. Davis*,[26] was that respectable courts should not disturb "dishonesty, unfairness and injustice" at the expense of precedent and dictum, the legislature of that state, acting on the recommendation of its 1936 Law Revision Commission,[27] which cited *Clayton v. Clark* and *Frye v. Hubbell*, has passed similar legislation.[28] And in India and Alberta have such statutes been enacted.[29]

Writing just one year after the decision in *Clayton v. Clark*, Dean Ames, citing that case with approval, in speaking of the rule of *Pinnel's Case*, said: "In one state, Mississippi, the rule was abolished by the court without the aid of a statute . . . . it originated in misconception is repugnant alike to judges and men of business, is not applied consistently to all the cases fairly within its scope, has been a source of highly artificial and technical distinctions . . . . and is likely to be generally superseded by . . . . legislation."[30]

A California Appeals justice, irking under the yoke of the Supreme Court of California, in upholding the rule of *Pinnel's Case*, although quoting Judge Wood's "swaddling bands" statement, said, "I concur in the judgment [for plaintiff for the balance of unpaid debt] for the reason that it appears unquestionably to be in accord with the prior decisions of our Supreme Court. The rule approved by these decisions—that is, that part payment on a money judgment under an express agreement on the part of the

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[18]Frye v. Hubbell, 74 N. H. 358, 68 Atl. 325 (1907).
[19]Dreyfus v. Roberts, 75 Ark. 354, 87 S. W. 641 (1905).
[20]Holmes v. Holmes, 129 Mich. 412, 89 N. W. 47 (1902).
[21]Dohm's Estate, 188 Wis. 626, 206 N. W. 877 (1926).
[22]Johnson v. Cook, 85 Conn. 679, 84 Atl. 97 (1912).
[23]Finlayson v. Harris, 49 Idaho 697, 291 Pac. 1071 (1930).
[24]Diehl v. McKinnon, 173 Iowa 32, 155 N. W. 259 (1915).
[25]1 WILLISTON, CONTRACTS (2d ed. 1936) § 120, n. 9.
[26]Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351 (1891).
[27]p. 119.
[28]N. Y. Laws 1936, c. 222.
[29]Indian Contract Act, § 63; Alberta Rev. St. 1922, c. 72, § 37g.
[30]*Two Theories of Consideration* (1898) 12 HARV. L. REV. 525, 531.

judgment creditor to accept the payment in full satisfaction of the judgment, is void, and not binding on the judgment creditor—is in my opinion *without reason*, is against the *universal custom* and practice of *business* and is *against good morals*."[31] (Emphasis mine).

The tenacity of the rule as a mere doctrinal proposition, is amazing. A number of courts while giving doctrinal lip-service to the rule in *Pinnel's Case*, but nevertheless using one of the familiar dodges, or inventing new ones to escape its unjust results, after stating and recognizing the rule, then proceed to bolster up the justness of their result to counteract the inaccuracy of their law with such remarks as, "But see *Clayton v. Clark*, an interesting decision to the contrary."[32]

Chasing old Bruin back to his original lair in England, we find that the "less conservative" English have even outdone us, for in the Sixth Interim Report of the Law Revision Committee, Section 35, presented by the Lord High Chancellor to Parliament, by commond of His Majesty, in May 1937, we find a recommendation with respect to Lord Coke's dictum in *Pinnel's Case* as follows: "It would be possible to enact only that *actual payment* of the lesser sum should discharge the obligation to pay the greater, but we consider that it is more logical and more convenient to recommend that the greater obligation can be discharged *either* by a *promise to pay* to pay a lesser sum *or* by *actual payment* of it, but that if the new agreement is not performed then the original obligation shall revive." (Emphasis mine).

It is submitted that the doctrine recommended by the English Law Revision Committee is certainly logically and doctrinally maintainable, if a promise is equally as good consideration as an act. And logically and doctrinally, a state which follows *Clayton v. Clark* would also hold that pre-existing duty does not defeat consideration,[33] but, unfortunately this time, it seems that Mississippi

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[31]Cantrall v. Waterman, 70 Cal. App. 184, 232 Pac. 997 (1924).

[32]Marshall v. Bullard, 114 Iowa 462, 87 N. W. 427 (1901); Am. Seeding Machine Co. v. Baker, 55 Ind. App. 625, 104 N. E. 524 (1914); Cunningham v. Irwin, 182 Mich. 629, 148 N. W. 786 (1914); Diehl v. McKinnon, 173 Iowa 32, 155 N. W. 259 (1915); Brackett Co. v. Lofgren, 140 Minn. 52, 167 N. W. 274 (1918); Schlessinger v. Schlessinger, 39 Colo. 44, 88 Pac. 970 (1907); where, however, the court refused to admit the claimed exception and enforced Pinnel's Case; Buel v. Kan. City Life Ins. Co., 32 N. M. 34, 250 Pac. 635 (1926).

[33]See Corbin, *Does a Pre-Existing Duty Defeat Consideration?* (1918) 27 YALE L. J. 362.

has again not been willing to go along with the proposed English rule.[34]

And finally therefore, we come to Bruin's obituary and it was but fitting that being born of dictum and having died of dictum, that certainly his obituary should be written in dictum. This task was assumed by Judge Hunter of the Texas Civil Appeals Court,[35] who also smarting under the yoke of a superior court, in speaking of *Pinnel's Case* said, "The only wonder to the writer is that courts of last resort do not overrule it entirely, as being opposed to to the rights and best interests of the people, as was done by the Supreme Court of Mississippi in 1897." Then in speaking of *Foakes v. Beer, supra,* he continued, "This decision of this grave body of lords and justices of England, if it fails to enlighten us on anything else, probably throws a glimmering ray on the value of horses, hawks, and robes back in that olden time, and makes it very clear why, a little earlier, as the immortal Shakespeare relates in his tragedy of Richard III, that bloody son of York offered on Bosworth field, at public outcry, his kingdom of England for a horse, and found no taker. . . . The writer, if he had the power, would do what the Mississippi Supreme Court did—overrule the rule—because, in his opinion, a man is entitled to do as he pleases with his notes, bonds and accounts. . . . But we are not driven to the necessity of overturning the rule in this case, for we are quite clear that, under the facts stated in the petition, we are enabled to *add to the long list of exceptions to the rule,* one which will probably be as useful as any yet found, and that is the alleged *insolvency of the makers* of the bond. . . . From the foregoing opinion it is easy to infer what the writer would do to the rule, if he had a chance; and his purpose in prolonging this opinion is to show the bench and bar of Texas how utterly unreasonable and unjust to contracting parties the rule is become, and how like a fetich [*sic*] the courts of this country have bowed down and worshipped around the old dictum out of idolatrous reverence for precedents, and because it smells old and musty, though it has long enough retarded the progressive young genius of American Commerce, and in fact it never should have been born. It is a rule now more honored in the breach than the observance, and the writer hopes that, when our supreme court gets even as good an opportunity as this, it will bury its skeleton so deep that no lawyer will ever scent it out, and offer it as authority in Texas again, as he would have done in this instance, if he had the power." (Emphasis mine).

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[34]Greener & Sons v. Cain & Sons, 137 Miss. 33, 101 So. 859 (1924); Leggett v. Vinson, 155 Miss. 411, 124 So. 472 (1929).

[35]Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415, 52 S. W. 16 (1899).

BIOGRAPHICAL SKETCHES

LIFE OF JUDGE ALBERT HALL WHITFIELD

*Will H. Watkins**

George Bernard Shaw has said that England deserves to be forgotten; that it has forgotten its great men; which reminds me that I think it is appropriate that this Association, at each meeting, should set apart a small space of time to discuss the memory of some great Mississippian who has gone before.

I read in the paper that my friend, Judge Fletcher, had been invited to the University of Mississippi to pay a tribute to that great lawyer, Judge Edward Mayes. At the same time Judge Kimbrough asked me to make a similar address, and I selected as my subject a man of whom Judge Edward Mayes always reminds me —Judge Albert Hall Whitfield; not because they were so much alike, but because of their marked differences. They met on the campus of the University and went through that institution together. They practiced law in Oxford together. When Judge Whitfield came down here as a member of the supreme court bench, he lived as adjoining neighbor to Judge Mayes, and Judge Mayes probably appeared before his court more often than has any other lawyer. There existed between them during their entire lives a friendship of the most intimate nature.

Carlisle has stated that every family at some time has produced one great man. Judge Whitfield belonged to a family which produced a number of great men. He was in direct line of descent from George Whitfield, the revolutionary pulpit orator. The Whitfields were pioneer settlers of the State of Mississippi. The branch of the family to which Judge Whitfield belonged settled in the prairie section of Mississippi, near the town of Aberdeen. From that family there have sprung many notable persons. Out of the family came two governors of the state. There are portraits in the Hall of Fame in Jackson of four members of this family. No family in the state has produced more really worth while persons. There is a tradition that he was related by blood to Marshall Hall, an English lawyer, said to have been the most eloquent advocate of his day. Mr. Hall rose from the ranks to the highest position at the English Bar, and became a member of Parliament. He was

*This address was made by Hon. Will H. Watkins before the Thirty-third meeting of the Mississippi State Bar at Vicksburg, Mississippi on June 8, 9, 10, 1938. With his permission, it was withheld from publication in the Proceedings issue.

a contemporary of Sir John Russell, Rufus Isaacs, and Lord Burkenhead.

Judge Whitfield received his preparatory academic work under Professor Henry Tutwiler of the famous Alabama Private School. He then entered the University about the year 1867. His record was, as a student, one of unusual brilliance. He made an average grade of 97.57. He was especially proficient in the study of Latin. It is stated that in his sophomore year, his entire class in Latin voluntarily applauded him upon his rendition of the last chapter of Tacitus on the Life of Agricola. He was the valedictorian of the class of 1871. On account of his splendid qualifications as a scholar, he was retained in the University, first as an instructor, and then as Adjunct Professor in Latin. Upon April 2, 1885, after Judge Whitfield had been admitted to the bar and was practicing in Oxford, Mississippi, four members of the faculty, who had taught him while in the University, voluntarily gave him the following certificate:

"Oxford, Miss., April 2nd, 1885.

"Mr. A. H. Whitfield graduated at the University of Miss. in 1871, as a Bachelor of Arts, with the first honor, in a large class, in which he had talented and ambitious competitors. His average grade in all departments, for the four years' course, was 97.57 per centum, a standard scarcely ever equaled in the history of this institution. His uniformly superior attainments in all subjects indicate not only an intellect of high order, but also a well balanced mind. As an eloquent speaker and forcible debater he had not a peer in the Literary Society of which he was a member.

"His scholarship and his deportment gave his instructors and his friends high hopes of successful and noble achievement in the profession he might select. The Board of Trustees of his Alma Mater showed the estimate in which they held Mr. Whitfield, as a scholar and as a man, by electing him Tutor, immediately after his graduation, and subsequently promoting him to the position of Adjunct-Professor. In these positions he fully sustained the enviable reputation he had made while a student.

"Mr. Whitfield, when he was our pupil and our associate, revealed but the qualities which usually command success at the Bar. The reports that have come to us with regard to his career as a lawyer are in accord with the

expectations we had formed when he was under our daily observation.

"A. J. Quinche, Prof. of Latin
"C. W. Sears, Prof. of Math.
"J. J. Wheat, Prof. of Greek
"George Little, Prof. Geology

"P. S. The four signatures affixed to this paper include all the members of the Faculty of 1871 now at the University.

"A. J. Quinche."

Judge Whitfield first practiced law at Grenada and then removed to Oxford, formed a partnership with the Hon. W. V. Sullivan, who afterwards became a member of the United States Senate from the State of Mississippi. They were engaged in cases in practically every county in northwest Mississippi. Judge Whitfield was especially adapted to the trial of cases. He was an advocate of unusual ability. His firm were engaged in many very important cases, both civil and criminal. Few men, who have practiced law in the State of Mississippi, were as successful before the juries. He had a commanding appearance, was a forceful speaker, had a fluent command of the English language, was able and adroit in debate, and met with great success. It is stated that in the trial of cases he held juries spell-bound. At the same time he was a studious, careful, painstaking lawyer. He presented many cases of importance to the Supreme Court of the State of Mississippi, as well as to the federal courts in the state. He was resourceful, ingenious, industrious, painstaking in the presentation of his cases. His services were greatly sought, and if he had remained at the bar, would have attained very great distinction. In 1892 he was elected Professor of Law at the University, and took the place of Judge Edward Mayes, who had moved to Jackson to practice law.

In the year 1894, Governor John M. Stone appointed Judge Whitfield Associate Justice of the Supreme Court of Mississippi. He became Chief Justice on April 1, 1900. The task assigned to him was a most difficult one; he was appointed to take the place of Chief Justice J. A. P. Campbell, who had occupied the position of Chief Justice for many years.

Judge Campbell was a lawyer of great ability and had a distinguished career on the bench, and by reason of his high character and illustrious services, he was revered by the bench and bar of the state. It is doubtful if any man appointed to the Supreme Court of the state was better qualified by natural ability, training and character than Judge Whitfield to occupy this high office. He

brought to bear in the performance of his official duties all of his ability, culture and mental powers. At the time he became a member of the court, owing to an increase in litigation, the court had got probably two years behind with the hearing of cases. With great industry and energy, he was instrumental in overcoming this handicap in the administration of justice.

Judge Whitfield had a most analytical mind. He possessed the capacity, which he used to the fullest extent, of going directly to the point in a case necessary for its determination. He concentrated his great mind upon the essential point and separated the chaff from the wheat. Having an unusually analytical mind, he was able to distinguish cases cited, to point out the essential distinction, and, thereby, to exercise rare powers of discrimination. His views as to the value of precedents were well expressed in a public speech delivered in the city of Jackson at the Taft Banquet, hereinafter to be referred to. He used the following language:

> "It is difficult to tell which would be the more dangerous judge, he who adheres slavishly to the precedents of a century since, or he who, with 'the busy hand of reformation,' and with reactionary spirit, disturbs settled rights, and overturns law, crystalized in the customs and institutions of the people. Law undergoes evolution, along with the changing conditions and advancing civilizations out of which it grows, and he is, therefore, the wisest judge who, walking in the golden mean, aids in developing, establishing and maintaining, a jurisprudence adapted to, harmonious with, and preservative of, the highest and best interests of the people over whom it extends."

The subject of this sketch, in arriving at the solution of questions presented to the court, was studious and industrious. He had wonderful powers of concentration, which he brought to bear in the study of each case. He was a man of strong convictions. However, in conference with his associate justices he had an open mind; he yielded to reason and authority; in consultation he had the ability to analyze and lay bare the precise question involved to an extent possessed by few judges.

In addition to his accomplishments as a student of law and literature, he knew the Bible by heart; he said it was the Book of all books; he could recite chapter after chapter. It is interesting to note that throughout his judicial career, he cited the Bible in a number of cases. In the case of *Peabody v. State*,[1] in affirm-

[1] 72 Miss. 104, 17 So. 213 (1894).

ing a conviction for prostitution, he set out in his opinion Proverbs, Chapter 7, verses 6-23, and stated that he was content to affirm the case upon such authority, using the following language:

> "This portrait is accurate; its colors have lost none of their vividness in the lapse of centuries; and, upon the authority of this great text, reflected in all the textbooks and decisions, the judgment is affirmed."

While, as above stated, Judge Whitfield sought the views of his associates, and frequently yielded preconceived opinions, if, however, after prolonged conference with his associates, his views differed from those of other members of the court, he refused to surrender. He was a man of strong convictions, and was the author of many dissenting opinions. I think it is but a just tribute to him to say that his dissenting opinion in the case of *Henry v. State*,[2] put an end forever to the leasing of state convicts to private individuals.

In the Seddons trial in London, where the defendant was represented by Marshall Hall, he used the following language:

> "I often think that possibly the bandage over the eyes of Justice has a two-fold meaning. Not only is it there so that the course of justice should not be warped by prejudice or undue influence one way or the other; but sometimes I think it is put there so that those who gaze should not see the look of infinite pity which is in the eyes of Justice behind that bandage, the look of infinite mercy which must always temper justice in a just man."

Judge Whitfield was not subject to any outside influence of any character. In the administration of justice, he knew neither race, nor color, nor creed. He also possessed to a high degree a sense of infinite mercy with which he tempered justice.

As might be expected, Judge Whitfield, while a member of the court, rendered decisions in many important cases. Time forbids that any detailed account be given of them here. He had a mind which enabled him to grasp constitutional and federal questions. Appeals were taken to the Supreme Court of the United States from fourteen decisions rendered by him, and in each case the decision was unanimously affirmed by that great Court.

In the case of *State of Mississippi*, ex rel *etc. v. L. & N. R. R. Co.*[3] the court held constitutional the act of the Mississippi legis-

[2] 87 Miss. 1, 39 So. 856 (1905).
[3] 97 Miss. 35, 51 So. 918 (1910).

lature prohibiting any interstate railroad company from removing a case to the federal court. He rendered a vigorous and scholarly dissenting opinion. The question reached the Supreme Court of the United States in *Railroad Commission v. L. & N. R. R. Co.*,[4] wherein the views expressed by Judge Whitfield in the dissenting opinion were upheld.

Judge Whitfield is accorded today, by the bench and bar of Mississippi, the position to which he is entitled, that of an able lawyer and a great and upright judge.

Judge Whitfield was essentially a great orator. He was a genius with all concomitant eccentricities. It is stated that orators are born and not made. It may be true that the capacity to become a great orator is a gift. However, it is one which may be cultivated. Demosthenes, the great Athenian orator, by discipline overcame an impediment in speech, and became an orator of unusual ability. Plutarch says he spoke like one inspired. Henry Clay, "the mill boy of the slashes," in his youth desired to be an orator. He suffered, however, from a weakness of his voice. He went out into the mountains of Virginia, spoke to the hills and trees, and developed his oratorical ability to such an extent that he became the greatest orator of his day. It is said that John Randolph of Roanoke, who was in Congress with Henry Clay, disliked him very much. Randolph, traveling for his health in his last years, passed through Washington and read in the paper that Henry Clay would speak in the Senate the next morning. He asked to be taken upon his bed to the Senate chamber in order that he might once more hear the beautiful, musical tones of that voice. Lord Burkenhead, in his speech before the American Bar Association, stated that the power to influence the human emotions by the voice was the greatest gift from God to man. Judge Whitfield possessed this gift to a very great extent. He had all of the reticence and timidity characteristic of great orators. I am told by a person, who was present at the commencement exercises of the graduating class of 1871, that the Chancellor of the University, when Whitfield's time came to speak, called for him. He was nowhere to be found. After diligent search it was ascertained that he had endeavored to seclude himself by taking a seat in the rear of the chapel. It is said that the Chancellor of the University went down into the audience, brought him to the rostrum, and that the people who heard him on that occasion were not surprised when they were informed that he had become one of the great orators of the state.

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[4]225 U. S. 272 (1921).

He was a great student. His favorite among the poets were Shakespeare, Scott and Byron. He had a most retentive memory, and could recite from memory page after page of prose and poetry stored away in his retentive mind.

He had the same brilliant imagination, capacious memory, exquisite diction and classical culture of Sargent S. Prentiss. Time will not permit me to call your attention to more than three of his outstanding speeches, though he made many. It was difficult to get him to speak. Some one asked Mrs. Whitfield once if she were ever afraid, while he was making a speech, that he would forget it. She said no, that that was the least of her troubles, but that she was some times apprehensive lest he would go out the back door when the time came to speak. When he did speak, however, he thrilled audiences as few men have ever done.

I have a very intimate friend, who is now a judge in Mississippi, a judge of one of our courts, and who was in the law school in December, 1889. Upon the 6th day of that month early in the morning, it was announced that Jefferson Davis, the only President the Confederacy ever had, had passed away in the City of New Orleans. Spontaneously, throughout the Southland in every city and county, men and women gathered together in some church, courthouse or auditorium and paid tribute to the gallant Confederate leader. The same thing took place in Oxford. The citizens gathered about 10 o'clock in the courthouse. It is stated that Judge Whitfield came in, avoided attracting any special attention, and took his seat back in the audience. Several speeches were made. The crowd began to get restless. Toward the end, however, some person walked down into the audience and after some difficulty persuaded Judge Whitfield to come to the stand. If he had made any preparation, no one knew anything about it. It is said that when he had talked about ten minutes, the interest of the crowd was aroused. They sat up and began to take notice. When he had spoken ten minutes more they began to cheer. At the end of ten more minutes they were all standing up on top of the benches. Finally in a peroration of about ten minutes, in diction of indescribable beauty, which evidenced the highest oratorical genius, he described to the audience the reunion that was then taking place in the land beyond the skies between Jefferson Davis and the soldiers who wore the grey. My friend told me that the crowd could not stand it; that you could not hold them; that they went upon the platform, took him upon their shoulders, carried him around the court square. This was indeed a great tribute. It is stated that the speech was purely extemporaenous. Somebody asked Daniel Webster once, immediately after he had replied

to the speech of Senator Hayne in the Senate, how he could possibly make that speech with so little preparation. Only a few hours had elapsed between the closing of Hayne's speech and the beginning of Webster's. To which Webster replied that he had been preparing for that speech all of his life, and I think Judge Whitfield had been doing somewhat the same thing.

He was born in the year 1849; he was too young to go into the Confederate army during the Civil War. As a mere youth, however, he witnessed the devastations of an invading army; following the surrender of Robert E. Lee to Grant at Appomatox he had seen the Confederate soldiers return home and take up the broken threads and prepare to rebuild their civilization. His admiration for the Confederate soldier amounted to a passion. He loved to call attention to the fact that at the Battle of Gettysburg, the bodies of dead Mississippians were found higher up the slope than the soldiers of any other state. He painted the purity and unselfishness of the Confederate cause and the dauntless courage of the Confederate soldier in imagery of unsurpassed beauty.

In November, 1909, the President of the United States, the Hon. William Howard Taft made a visit to the capitol of the state. Judge Whitfield was then Chief Justice of the court. The citizens of the state, in appreciation of the President's visit, prepared and gave a most elaborate banquet in the dining room of one of the hotels. There were probably three hundred guests. There was assembled a very distinguished body of men. At the speaker's table there was President Taft himself, who made a most gracious speech. He touched the hearts of the people of Mississippi by an affectionate reference to L. Q. C. Lamar, and revealed to them for the first time the intimate contact that he had had with Judge Lamar. There was the Hon. J. M. Dickinson, a former native of Mississippi, who had been General Attorney for the Illinois Central Railroad Company, in Chicago, and was then Secretary of War under President Taft. There was James C. Longstreet, one of the most brilliant and lovable men that Mississippi ever produced. There was Archie Butts, the personal aide to President Taft, a native of the State of Georgia, who subsequently met a tragic death at the sinking of the Titanic. Judge Whitfield was on the program. When he arose to speak, he received that profound attention which his position entitled him to. Since President Taft had been a member of the judiciary, Whitfield took the judiciary as the subject of his speech, which had been carefully prepared and committed to memory. It was the speech of the occasion. As a matter of fact, he was in a class to himself. Everyone present was thrilled by his great effort, and it was obvious that the Presi-

dent of the United States was greatly impressed. We hear a great deal today about the independence of the judiciary. Judge Whitfield had some ideas upon that subject himself. He gave expression to them in the following language:

> "The judiciary is the great conservative force of the country. It sits between contending litigants, the calm and final arbiter of life, liberty and property. The supremacy of its authority binds it, by the highest and most solemn obligation, to patiently, faithfully and fearlessly ascertain the very right of every cause, and, in the beautiful and noble language of the Episcopal liturgy, 'to execute justice and maintain the truth.' Absolutely impartial, it has no friends to reward and no enemies to punish. Whatever distinctions, social or political, may elsewhere obtain, it knows, it can know no race, nor color, nor sex, nor rank, nor condition. At its bar the humblest stands the unchallenged peer of the mightiest, and the most defenseless is clothed with the same measure of right, and receives the same equal justice, that is meted out to the proudest in the state. The judiciary must be fearlessly independent. Neither the prerogative of the crown, nor the omnipotence of parliament, could move Coke from his immortal stand for English liberties, and the splendor of that really grandly great achievement fills the judicial sky of Britain still, with fadeless light.
>
> "Here, at last, are anchored the confidence and faith of the people in the protection of equal laws. However passion and prejudice may kindle into flame, in other arenas, the interests and sympathies of stormy partisans, here, at least, serene amid tumult, far removed from the reach of angry strife, unawed by power, unmoved by public clamor, stands the judge, the high priest at the altar of passionless justice, administering the delegated functions of Him of whom alone it can be said, 'A God without iniquity, just and right is he.' And the judiciary must exercise independent thought."

Judge Whitfield delivered his masterpiece at the dedication of the new capitol in Jackson upon the 3rd day of June, 1903. That was a notable occasion, one which he doubtless felt challenged all of the eloquence and ability which he could command. The people of the State of Mississippi were abandoning the old capitol building, which stands at the head of the street. It had for seventy-five years been the symbol of sovereignty of the people of Missis-

sippi. Within its walls resounded the voice of Sargent S. Prentiss, Andrew Jackson, Henry Clay and L. Q. C. Lamar. In this building the Secession Convention of 1861 had met. In 1884 Jefferson Davis had made his farewell address to the people of the State of Mississippi, on which occasion he was introduced to the legislature and the assembled audience by Lieutenant Governor Shands, as the "embodiment of history." It had witnessed the drama of impeachment, and within its walls was held the Constitutional Convention of 1890. It had seen an enemy army lay waste the capital city. Mississippi, however, was entering upon a new era. The virgin pine forests were to be converted into lumber; industry must be encouraged. The people of the state gathered in great numbers to receive the new capitol building, a beautiful specimen of architecture, built without a penny of graft. It was to be a symbol of the aspirations of a great people, an incentive to lofty citizenship.

Judge Whitfield appreciated to the fullest extent the importance of the event, and he arose to it. I ask you to read this speech and commend it to you as a brilliant oratorical effort, fully doing justice to the occasion. It is sufficient to say that upon that occasion Judge Whitfield spoke with Bishop Charles B. Galloway, the greatest pulpit orator of modern times, a man whose oratorical ability had held spell-bound the people of two continents. I think it is a great tribute to Judge Whitfield to say that if you will put the two speeches side by side, one is just as good as the other. If Judge Whitfield had never made in his life another speech than that which he made upon this occasion, it would have made him famous as an orator and entitled him to the gratitude and plaudits of his fellow citizens. The death of Judge Whitfield marked the passing of that great class of orators, which included Sargent S. Prentiss, L. Q. C. Lamar and Bishop Charles B. Galloway.

No character sketch of Judge Whitfield would be adequate without slight reference to his domestic life. He was a great lover of home, surrounded by his wife and children. Mrs. Whitfield remained to him the radiant beauty whom he had courted, won and married. He was a man of great hospitality, for he loved people, especially the society of young persons. His home was a most popular one where the branches of the family gathered, as did his innumerable friends. Judge Whitfield was a brilliant conversationalist. Out of his capacious memory he quoted prose, poetry, the Bible, and an endless number of interesting narratives with which he charmed his listeners.

His eldest daughter tells me that upon one occasion in the morning he had told her that the young gentleman, who called the night before stayed to rather a late hour, to which she replied:

"Father, you did not leave the parlor yourself until after 10:30."

This was characteristic of the man. Young people were charmed with his society.

Judge Whitfield was an active member of the Baptist Church, of a fervent religious nature, of strong religious conviction and faith. A few days shortly before his death, he dictated a memorandum to a stenographer containing a few intimate things that he wanted members of his family to know. He had suffered a second stroke of paralysis and realized that the path was growing shorter every day. He stated that he rested his faith in "Jesus Christ the same yesterday, today and forever."

Judge Whitfield died November 12, 1918. His portrait adorns Mississippi's Hall of Fame.

JAMES HECTOR CURRIE, ORATOR AND LAWYER

*George H. Ethridge**

James Hector Currie was born in Kemper County, Mississippi, November 8, 1854. He was the son of Archibald C. Currie and Isabella McNeill Currie. His father was born in Robinson County, North Carolina in 1806; his grandfather was Angus Currie of that state. Archibald C. Currie, his father, was educated to be a teacher and followed that profession for a number of years. At the age of twenty-five years he married Isabella McNeill and removed from North Carolina to Alabama, where he remained one year. Thence he moved to Mississippi in 1838 and, settling in Kemper County, in the neighborhood of Kemper Springs, acquired a plantation of a thousand acres. Kemper Springs, in those days, was a summer resort, with copious springs of health-giving waters, where wealth and refinement congregated for rest and recuperation. From the time of his acquiring this plantation, Archibald Currie devoted himself to agricultural pursuits and passed the rest of his life upon his plantation. In his political opinions and affiliations he was a Democrat. He was, for a time, a member and president of the Board of Police of the county, now called Board of Supervisors. He was a man of broad public spirit and of scholarly attainments. He was a member of the Presbyterian Church. At the outbreak of the war he furnished five sons to the Confederate cause: Daniel M., Angus, Archibald A., William C., and John. Angus and John were killed in battle; the others served throughout the war, Daniel and Archibald being wounded therein. The father died in 1869 in Kemper County.

The mother, Isabella McNeill, was born in Richmond County, North Carolina, in 1811 and died in 1880. She was the daughter of Daniel McNeill, and a woman of good education and rare attainments. She was a deep reader, and was possessed of such integrity of character as to win the love and admiration of all with whom she came in contact. Ten children blessed their union: Daniel, Flora A., Angus, Archibald A., William; John; Elizabeth; Margaret, Albert C., and James Hector, the subject of this sketch.

James Hector Currie, the youngest of these children, received his education in the common schools of the county and at Cooper Normal College at Daleville, Mississippi. After graduating, he taught school for a time in the county, and, in 1880, was elected to the legislature of the state where he became renowned as an orator and debater. He studied law and was admitted to the

*Associate Justice, Supreme Court of Mississippi.

practice thereof at DeKalb, in Kemper County, in 1884, in partnership with Major W. P. Evans, who was then a prominent lawyer and legislator of that county. Major Evans died in 1887 and Mr. Currie continued the practice, taking over the major portion of the business. Mr. Currie was elected Superintendent of Public Education of Kemper County in 1889, which office he held for several years, giving satisfaction to all. In 1887 he was married to Miss Frances Neville, daughter of Andrew L. Neville. Mrs. Currie received her education at Mobile, Alabama, and St. Louis, Missouri. Mr. Currie continued the general practice of law at DeKalb until 1900, when he became district attorney and moved to Scooba, Mississippi, where he lived for about two years and then moved to Meridian, Mississippi. There he lived until his death, in 1910, and there he is buried.

Mr. Currie had unusual gifts for oratory, both in court cases and on public occasions. Few men had his use of fine imagery and his capacity for coining striking phrases and unique figures of speech. He was ever ready for a speech on any occasion, and could make the most finished address extemporaneously. He was such a striking figure that one would not notice his slenderness of stature or the thinness of his face and forehead, appearing larger than he really was. He was an excellent conversationalist and could entertain a crowd at any time with a fund of anecdotes or stories of a humorous nature, and at the same time turn readily to a profound discussion of science, literature, or history. It was remarkable how he could have acquired such detailed knowledge of his subjects. He did not love the law as a science, nor was he a profound student of the currents thereof, but he knew much of legal history and the foundations of institutions. He was deeply read in the literature of humanity, and biography, knew men well, and was familiar with their habits of thought and their deepest emotions. He had that ability which "could paint the common occurrences in the habiliments of poetry and give to airy nothings a habitation and a name." His voice was musical, with good carrying capacity, and a slight impediment in his speech gave his utterances a peculiar felicity and attractiveness. He had that rare originality of mind from which illustrations and figures of speech sprang up spontaneously without preparation or forethought, making one think of Sargent S. Prentiss, though his style in phrase and substance was entirely different from that of Prentiss, as reflected in the printed report of his speeches. He could give wing to his wit and play his imagination with the best of orators—in fact, I have never listened to his superior as an orator in richness of illustrations and originality of thought. Many of his law

speeches would take rank with those of the masters of the profession; and often he was roundly congratulated for the felicity of his diction and the brilliancy of his fancy. Yet he seldom repeated any of the comparisons which took such hold on his hearers in any of these applauded speeches.

A gifted orator of our state many years ago, speaking of Henry Clay, said:

> "Of all the gifts with which nature decks her favorites, not the greatest or grandest certainly, but the most brilliant, the most fascinating, and for the moment most powerful, is exalted eloquence. Before its fleeting and brief glare, the steady light of wisdom, logic or philosophy pales, as the stars before the meteor . . . . Strong passions, quick sensibility, lofty sentiments, powerful reason, were the foundation of his oratory, as they are of all true eloquence. Passion, feeling, reason, wit, poured forth from his lips in a torrent so strong and inexhaustible, as to whirl away his hearers for a time in spite of their opinions . . . . A tall, slender, erect person, changing under the excitement of speech . . . . and last and most important of all a voice deep, powerful, mellow and rich beyond expression—rich is a feeble phrase to express its round, articulate fullness, rolling up with the sublime swell of the organ—all these together formed wonderful aids to eloquence."

This might have been well said of Mr. Currie.

On one occasion a young lawyer was arguing a case very earnestly, gasticulating rather wildly and jumping around. When he had finished, Mr. Currie said that the manner in which he was jumping around and gesticulating reminded him of a low dog in high oats. On another occasion he was prosecuting a person for disturbing the public peace by shooting and exhibiting a pistol. It seemed that this party had started the row, in which several became engaged, then ran to his house nearby, got his pistol, came out in front of the gate and fired the pistol. Mr. Currie said that he reminded him of a bench-legged fice which would stir up a row among other dogs, then run home, get before his gate, scratch back and bark.

In a celebrated case, which was hotly contested, Mr. Currie made up his mind that the defendant was guilty of murder and that he should be punished for his crime. The defendant was represented by three very able lawyers: Green B. Huddleston, S.

A. Witherspoon, and Judge W. T. Houston. Mr. Currie closed for the state after supper, and made a most scathing arraignment of the defendant, bringing the full force of his powerful oratory and legal reasoning to bear upon this trial. The three lawyers felt much discouraged, and after walking in silence for about three blocks from the courthouse to where they were living, one of them, Mr. Withersoon broke it saying: "Well, whatever else one may say about 'Hec,' he makes a fascinating speech."

"Yes, but it's hell on the defendant," said Judge Houston; and Judge Huddleston added, "Yes, and you can never tell what he is going to say in his closing argument." This conversation aptly describes Currie's speeches in criminal cases; they are fascinating, hell on the defendant, and one could never anticipate what he will say in closing the case.

I was his partner for two years, in daily consultation with him, and we discussed many things, both in law and on other subjects. I thought I knew the bent of his mind and the resources of his genius as well as anyone. I studied him closely; and upon his being elected district attorney I thought that I could anticipate his course of argument. But after being in contact with him at two terms of court each year for about ten years, I was never able to forecast his closing argument. He always said the unexpected, often exploding arguments that had been carefully prepared and thought unanswerable. I could tell many stories about the court terms at DeKalb where I practiced, and I have heard many others at other points. On one occasion court met while I was a member of the legislature and a change of court districts was in prospect at that term. The judge was interested in keeping his district intact and wanted me to return to the legislature as quickly as I could, and expressed a willingness to pass all my cases in order that I might return, provided I made application to do so publicly. This was satisfactory to me as I had a few criminal cases which I wanted passed. I made my appeal, stating that I was on the subcommittee that had the bill in charge and wanted to get back; that many important matters were pending; and that my presence was needed in the legislature. The judge then asked Mr. Currie what he had to say about my request. He replied that I was a good deal like the fly that lit on the bull's horns and then asked the bull if his presence was objectionable. The bull replied, "If you had not mentioned it, I would have never known that you were there"; that if I returned to the legislature they would never have known that I had been absent unless I told them.

Shortly after Currie became district attorney, there was a celebrated murder case in which an Indian had been killed. The defendants had had him in custody on a criminal charge shortly before his dead body was found, claiming that they were on their way to place him in jail at DeKalb. But they never carried him to jail. The dead body of the Indian was found one week after they had been seen with him, shot through the heart and his hands tied. The defendants claimed that the Indian had chased the wife of one of the parties. When he was found dead under some brush and sand one rainy day in the month of February, his body was not swollen and no stench came therefrom. It appeared as though the man had been only recently killed. A man claimed that he had seen the Indian the Thursday after the defendants had him on Tuesday, and before he was found dead the next Tuesday, and that he was then alive and free. I had been employed with others to defend these parties, and had built up quite a theory that he could not have been dead a week; that putrefaction would have set up within a few hours after death; consequently, he could not have been killed on the day when the defendants had been seen with him. On the fact that no one other than this man had seen the Indian, I argued that there was nothing strange about that, for, in rural sections, people often went a whole week without seeing any one except their own family, and that I myself had often gone for that same length of time without seeing any one. In his closing argument, Mr. Currie replied by saying that Indians were different from white persons; that in death they did not swell up or stench as did other people. He gave an example by telling of a lynching which took place some years before in which an Indian was hanged to a limb and remained for three weeks; that when he was cut down he had not become swollen, nor did his body have a stench thereto. In reply to my argument that I had often gone a week on the farm without seeing anyone but the family, he said that was nothing strange; that he had understood that my father had to run me down with hounds every Sunday to get clean clothes on me, creating a hearty laugh at my expense. I thought nothing of his statement about the Indian who had been mobbed, deeming it a mere figment of the fancy; but there was a man on the jury who corroborated Mr. Currie's statement, saying that he was present when the Indian's body was cut down. This, of course, shattered all my carefully planned argument; it went "with the wind." It was often the case that a story of a humorous nature told by him would shatter a serious argument. He was a master of the art of story-telling; and a risque joke or story, told by him, did not carry the same offense to the moral sense of a refined person as did that told by the average person.

In another case a negro sued a white man on some timber transaction. I was employed by the negro, and Mr. Currie by the white man. It seems that harsh words had been used by the white man about the transaction, and the old negro fled from the community in fear. Currie made quite a joke of it, saying, "from that time on Phil's flight would take rank with the hegira of Mahomet." On another occasion, a prominent man had been indicted for killing another who had been somewhat offensive to the neighborhood in which the killing occurred. A special venire was drawn for the trial, and the veniremen were considered favorable by me and my client, and also by the district attorney. Upon a motion by him to quash this venire and continue the case, which motion the judge sustained, I went to him and said, "Why don't you give me a jury and verdict? You know my client's family and friends are influential and numerous and that you can never get a conviction." He replied, "Yes, I know that I can't convict him but I can put him on trial and break him up. When he gets out of this he will not feel like doing any more meanness." It is expensive and troublesome for a man to stand trial, as one is never entirely certain what a jury may do, and this is one method of curing an appetite for breaking the law. Many other things could be related, but the above will illustrate his personality, mentality and ability as an advocate and orator.

During my partnership with Mr. Currie I had occasion to know him as few men know others. He was above the petty temptations that arise at times in the profession, and on a number of occasions talked clients out of bringing suits which, considered from a purely legal standpoint, he could have won, never charging a fee for such advice. There were two such cases in particular which impressed, indelibly, upon my mind his high conception of a counselor's relation to those who came to him for service. One, a man of splendid character and fine reputation, had domestic troubles which were very trying, which had been borne in silence for many years, and from which he had determined to seek a divorce. Although Mr. Currie had a legal case and one which he could have undoubtedly won, commanding a large fee, he pointed out, in one of the most impressive conversations I ever heard, the best course for the client and advised him against the divorce. In the other, certain parties had been on a guardian's bond and sought to be released therefrom. The clerk struck out their names, inserted the names of others who had agreed to go on such bond, but failed to make an entry of same on the minutes to legally justify the release, all parties acting in the utmost good faith and thinking that they were released. Afterwards, a default occurred in

the matter and suit was filed against both the names of the old and new guardians. Currie advised that there had been no release, and that, legally, the original parties were liable. They wanted to fight the case anyway; and notwithstanding his advice against it they offered him a fee to handle the case. He refused to accept employment.

Had Mr. Currie's talents been used in the halls of Congress, they would have reflected great lustre upon his state. He was peculiarly fitted for service in that great arena, and his oratory and mind would have attracted national attention.

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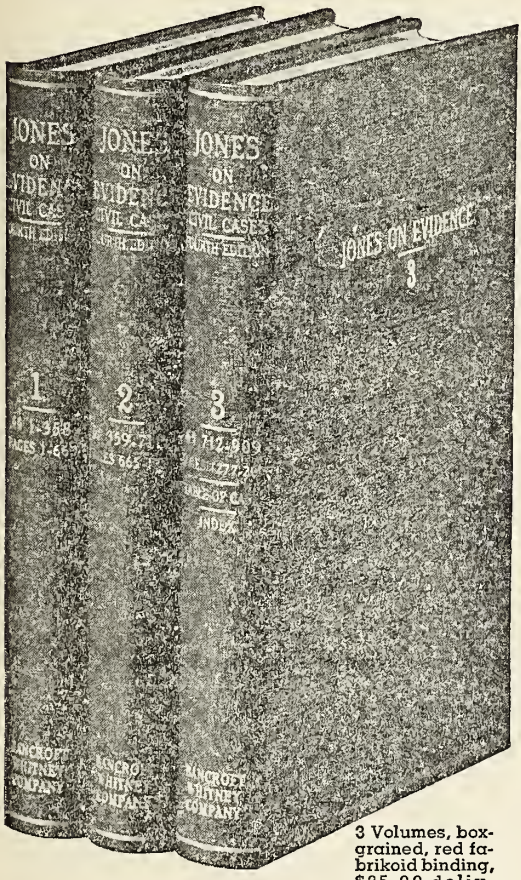

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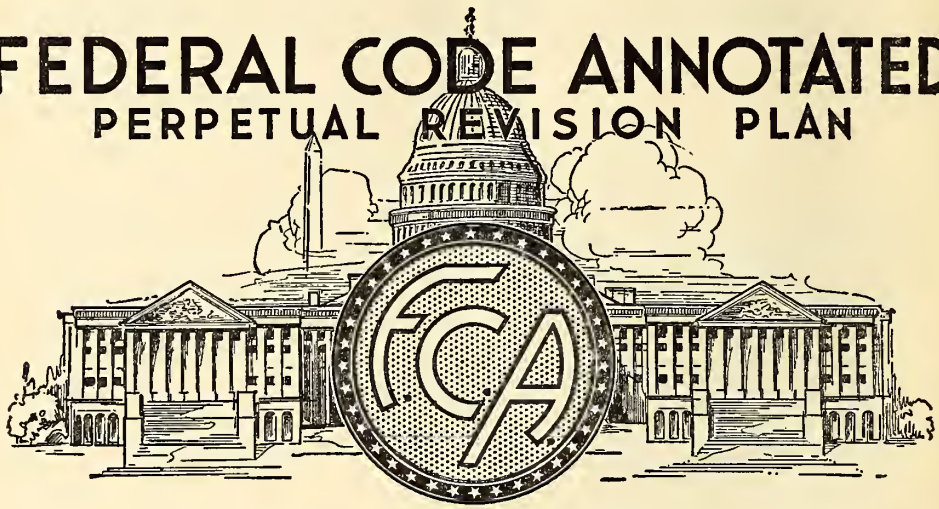

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